IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 13, 2004 Session

STATE OF TENNESSEE v. WILLIAM GLENN ROGERS

Circuit Court for Montgomery County
No. 38939 Robert W. Wedemeyer, Judge

No. M2002-01798-CCA-R3-DD - Filed June 30, 2004

The defendant, William Glenn Rogers, appeals his convictions by a jury for first degree premeditated murder, first degree felony murder in the perpetration of a kidnapping, first degree felony murder in the perpetration of a rape, especially aggravated kidnapping, rape of a child, and two counts of criminal impersonation. The felony murder convictions were merged into the first degree premeditated murder conviction. Following a separate sentencing hearing, the jury found that the proof supported four aggravating circumstances beyond a reasonable doubt: the murder was committed against a person less than twelve years of age and the defendant was eighteen years of age or older; the defendant had previously been convicted of one or more felonies, the statutory elements of which involve the use of violence to the person; the murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of the defendant or another; and the murder was knowingly committed, solicited, directed, or aided by the defendant while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit, any rape or kidnapping. See T.C.A. § 39-13-204(i)(1), (2), (6), and (7). The jury further determined that the aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt and sentenced the defendant to death for the murder. He received an effective consecutive sentence of forty-eight years in confinement for the other offenses. The defendant raises the following issues for review: (1) whether the evidence is sufficient to convict and to support a sentence of death; (2) whether the trial court erred in failing to grant the defendant's motion for a change of venue; (3) whether the trial court erred by not suppressing the defendant's statements to the police; (4) whether the trial court erred by not suppressing the defendant's statements to third parties; (5) whether the trial court erred by excluding two jurors for cause; (6) whether the trial court erred by limiting the cross-examination of Jeremy Beard; (7) whether the trial court erred in admitting a photograph of the victim's skull and a photograph of the victim taken during her life; (8) whether the trial court erroneously instructed the jury on the definition of "intentional" in the first degree murder charge; (9) whether the trial court erred by failing to instruct vehicular homicide as a lesser included offense of first degree murder; (10) whether T.C.A. §§ 39-13-204(f) and 39-13-204(h) are unconstitutional; (11) whether the proportionality review mandated by T.C.A. § 39-13-206 is inadequate because it fails to apply meaningful standards for determining whether a death sentence is disproportionate; and (12) whether the death penalty is unconstitutional because it is imposed in a discriminatory manner. We conclude

that the evidence is sufficient to support the jury's verdict and sentencing, that no errors requiring reversal exist, and that the sentence of death is proportional to the penalty imposed in similar cases, considering the nature of the crimes and the defendant. Accordingly, we affirm the convictions and the sentence of death.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and, JOHN EVERETT WILLIAMS, JJ., joined.

Brock Mehler, Nashville, Tennessee and Jerome M. Converse, Springfield, Tennessee, for the appellant, William Glenn Rogers.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Assistant Attorney General; Angele M. Gregory, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and C. Daniel Brollier and Lance A. Baker, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTS

Guilt phase

This case relates to the assault on and killing of nine-year-old Jackie Beard. On July 3, 1996, the victim, fourteen-year-old Carl Webber, and twelve-year-old Jeremy Beard were playing outside the Beard children's home when the defendant approached them. The children had seen the defendant, who identified himself as Tommy Robertson, drive by them earlier while they were playing at a "mud hole" in Whitlow's Hollow near the Beard children's home. The defendant offered to take the children swimming and told them he had fireworks. He also told the children that he was an undercover police officer and that he was looking for someone named Scott Hall. The defendant appeared to be carrying a walkie-talkie, but it is unclear whether he ever communicated via the walkie-talkie. The defendant left and the victim went home to get her mother, Jeannie Meyer.

Jeannie Meyer returned to the "mud hole" with her daughter. Soon thereafter, the defendant arrived with fireworks. The defendant told Ms. Meyer that he was an undercover police officer named Thomas "Tommy" Robertson. He said he was a partner of Allen Norfleet from the North Precinct. He then commended Ms. Meyer on finding out who he was because there are "a lot of sickos in the world." He also advised Ms. Meyer that he knew her mother-in-law, who owned a local restaurant, and her brother-in-law. He inquired about taking the children swimming, and Ms. Meyer responded that they were not allowed to go anywhere with anyone. Ms. Meyer then took the children home, and the defendant left also. Thereafter, Ms. Meyer talked to the children about

strangers. At trial, Ms. Meyer testified that she told the children that they should stay away from strangers, even if they thought they might know them, and that they should never go near a vehicle occupied by a stranger. She also told the children that people sometimes lie and are untruthful about their identity and that some people carry fake police badges.

The following day, July 4, 1996, the defendant, his wife, Juanita Rogers, and Mrs. Rogers's granddaughter went to Land Between the Lakes for a picnic. While there, the defendant and Mrs. Rogers' granddaughter went for a walk. They walked a long distance down a dirt road near Dyer's Creek. Upon returning from the walk, the defendant told his wife that "you could bury a body back here and nobody would ever find it."

At approximately 5:30 a.m. on July 8, Mrs. Rogers left for work at the Busy Bee restaurant, which was next door to the Rogers' residence. Mrs. Rogers saw her husband that morning and again before lunch. Thereafter, she did not see him again until approximately 6:00 p.m. The defendant was driving his wife's white Chevrolet that day.

During the afternoon of July 8, 1996, at approximately 1:30 p.m., the defendant appeared at the Meyer residence. He advised Ms. Meyer that he had lost his keys on July 3 and asked that they "keep an eye out" for the keys. Ms. Meyer responded that neither she nor the children would be in the area where they had met earlier because she had a doctor's appointment in approximately thirty minutes. He then told her that if they found the keys, she should call Sergeant Brian Prentice with the county police and tell him they had found Tommy's keys. During the conversation, the victim and Jeremy came outside and stood on the porch where the adults were talking. After the conversation, Ms. Meyer and her children went inside their home, and, according to Meyer, the defendant walked down the hill in front of their home in the direction of a nearby abandoned trailer.

Once the family was inside the home, the children began to watch television. Soon thereafter, the victim began to ask her mother if she could go outside to pick blackberries to take to the doctor's office. Ms. Meyer refused at first, but after more requests, she told her daughter she could go outside after changing her clothes. The victim changed into a Minnie Mouse T-shirt with hot pink circles on the front, teal blue shorts, and a pair of new multi-colored leather woven sandals. Ms. Meyer told her daughter that they would be leaving in fifteen minutes for the doctor's appointment and instructed her not to go looking for the lost keys. Ms. Meyer believed her daughter left around 1:40 or 1:45 p.m. Ten to fifteen minutes later, Ms. Meyer went outside to get her to go to the doctor's appointment. She looked for her and called for her, but received no response. She and Jeremy drove to the area known as Whitlow's Hollow, where they had met the man they thought was Tommy Robertson the week before. During their drive, they called out the victim's name, but still received no response. They stopped and asked Joey Sauers, whose mother and stepfather owned the property known as Whitlow's Hollow, if he had seen the victim. He had not, nor had he seen a white vehicle in the area that day. Sauers estimated that it was approximately 2:00 p.m. when he met Ms. Meyer looking for her daughter. Sauers's mother and stepfather, Paul and Jackie Whitlow, began to help Ms. Meyer search for the victim. Ms. Meyer returned home to leave a note for her husband that they were out looking for the victim. She then began knocking on the neighbors' doors

to see if anyone had seen the victim or knew anyone named Thomas Robertson. One neighbor, Mike Smith, saw a white vehicle with a black front end driving in the direction of Whitlow's Hollow around noon or 1:00 p.m. on July 8. He saw the same vehicle pass by his house again around 2:00 p.m.

During her search, Ms. Meyer saw what she believed were a set of footprints up the side of a bank and down the road in front of the abandoned trailer. She also saw a set of footprints that she believed looked like her daughter's near the "mud hole." She returned home shortly after 3:00 p.m. Her husband was home at the time. She told him that the victim was missing and that the man who had identified himself as Tommy Robertson had been at their house earlier. Mr. Meyer told his wife to call 9-1-1, and he went searching for the victim. The 9-1-1 call was made at 3:26 p.m. Law enforcement officers soon arrived, along with a K-9 unit, to search for the victim.

At some point after 6:00 p.m., the defendant arrived home in muddy pants. He told his wife he had been in a tobacco field on Dover Road. According to Mrs. Rogers, the defendant's pants were muddy at the knees and looked like they had been wiped off. Although his pants were muddy, Mrs. Rogers noticed that his shoes were clean. She also noticed that there was a spot of blood on his shirt. When Mrs. Rogers questioned her husband about the blood, he responded that he must have cut his finger. Mrs. Rogers had been waiting for her husband to come home because she needed her car to take her granddaughter to school. When she got in her car, she noticed small fingerprints on the passenger side windshield. Mrs. Rogers asked her husband if a small child had been in her car, which he denied. Mrs. Rogers explained that the fingerprints or hand prints appeared to drag down the window. Mrs. Rogers also noticed that although she had given her husband money to put gasoline in the car earlier that day, there was little gasoline in the car.

During the evening of July 8, Jeannie Meyer was interrogated by law enforcement about the disappearance of her daughter. At approximately 9:00 p.m., she went to the police station and gave a description of the man who had identified himself as Tommy Robertson. Ms. Meyer acknowledged at trial that she was initially a suspect in the disappearance of her daughter, which she believed was not unusual in the disappearance of children. She admitted that the police report showed that her daughter disappeared around 1:00 p.m., but she said the report was simply wrong. Ms. Meyer also admitted that the police had questioned her about being involved in cocaine trafficking, and she suspected that her phone lines were tapped following her daughter's disappearance. Ms. Meyer was not satisfied with the investigation conducted by the Montgomery County law enforcement officials. The family conducted their own investigation into the victim's disappearance and brought in Billy Hale with the National Missing Child Locate Center.

On July 9, 1996, the day following the victim's disappearance, Mrs. Rogers accompanied her husband to the garbage dump. Mrs. Rogers thought it was unusual that her husband took only one bag of trash all the way to the dump. According to Mrs. Rogers, the defendant took the bag of trash out of his car and drove her white Chevrolet to the dump. En route, she noticed that her car had been cleaned from the day before, both inside and out, but the defendant denied cleaning the car. He

stated that the car was washed off by the rain, to which Mrs. Rogers stated it could not have rained inside the car.

As a result of the official law enforcement investigation into the victim's disappearance, a composite drawing of the suspect in the victim's disappearance was printed in the newspaper. Sergeant Brian Prentice received three telephone calls advising that the defendant resembled the man in the composite drawing. One of the phone calls came from Jerry Wayman. He said that he had sold the defendant a cellular telephone prior to July 8 and that he and the defendant had discussed Wayman's purchase of a scanner. Based on the information from the telephone calls, Sergeant Cliff Smith attempted to locate the defendant.

Sergeant Smith first located Mrs. Rogers, who told him that the defendant was working at Midas Muffler. Sergeant Smith found the defendant at Midas Muffler and questioned him about his whereabouts the previous several days. The defendant told the officer that he had been to Paris Landing State Park on Saturday and Sunday July 6 and 7. He said he had been home all day Monday, July 8 with his wife. He denied that he had ever been to the area where the victim lived and disappeared. He later admitted that he had a friend, Allen Norfleet, who was a sergeant with the Clarksville Police Department who lived in the area and that he had visited him about a month earlier. He denied possessing any fireworks. To corroborate his story of visiting the lake, the defendant showed the officer some floats and an air mattress in his trunk. Sergeant Smith returned to the Rogers's residence to discuss his investigation with Mrs. Rogers. At some point that morning, the defendant called his wife. She asked him what was going on, and he told her that two detectives had come to talk to him and wanted to search his car. She asked why they would want to do so, and he responded that he had no idea. During their conversation, she asked the defendant what he had told the officers about his whereabouts on Monday, July 8. He told her that he had been with her the entire afternoon. When she disagreed with him, he stated she must have her dates wrong.

Sergeant Smith returned to the defendant's place of employment for further questioning. After talking briefly with the defendant, Sergeant Smith asked the defendant to accompany him to the police station. Although the defendant was hesitant at first, he agreed. The defendant drove himself to the station where he was questioned by Sergeant Smith, Steven Hooker, a special agent with the F.B.I., Bret Murray, a special agent with the F.B.I., Jeff Puckett, a special agent with the T.B.I., and Billy Batson, an investigator with the Montgomery County Sheriff's Office. Sergeant Smith presented the defendant with three forms: a waiver of rights form (Miranda form); a consent to search the defendant's residence; and a consent to search the defendant's vehicle. Smith read the defendant his Miranda rights, and the defendant signed all three forms at 11:18 a.m. on July 11, 1996.

Initially during the interview, the defendant admitted he had been in the area where the victim lived on the day of her disappearance, but he denied being involved in the disappearance. The defendant explained that he shot fireworks with three boys on July 3 in the Cumberland Heights area where the victim lived. He stated that he lost a key to his shed during that time and that he returned

on July 8 to search for it. He admitted speaking with Jeannie Meyer and telling her to notify Allen Norfleet if she found the key. He denied that the victim was present during that conversation. The defendant said he left the Meyer residence and walked to an abandoned trailer because he had to use the bathroom. He said he defecated on a curtain inside the trailer and threw the curtain out the window. He said he drove to a waste management plant to inquire about employment but discovered that the help wanted sign had been taken from the window. He said he went home and called his wife to tell her that the help wanted sign was gone. He stated he was at home from approximately 3:30 to 4:00 p.m., when he left to drive around looking for work. He said he returned home again around 5:45 p.m.

The defendant accompanied officers to his residence for a search of the home. While there, the defendant agreed to submit to a polygraph test. Following the test, the defendant changed his story. He admitted that the victim had been present when he spoke with Ms. Meyer on July 8. He stated that after he left the trailer, he entered his car and smoked a cigarette. He said he began to back up and leave when he felt a thud. He thought he had hit a tree, but when he got out of his car, he saw the victim underneath the car. He stated he did not know what to do. She had blood coming from her nose and was having difficulty breathing. He found one of his old shirts in the trunk and used it to cover her head. He placed her in the passenger side of his car. The defendant stated he drove to the bridge on Zinc Plant Road, saw there was no traffic, stopped his car, and threw the victim's body into the river. He said that the victim was wearing multicolored sandals and that one of them had come off her foot. He grabbed the shoe and threw it also. He told the officers that he had not seen her until he ran over her. He stated that he did not touch her "in any way sexually or abusive." The defendant reduced this story to writing and signed the statement. He also signed a picture of the victim to verify that the picture portrayed the person he struck. The defendant consented to a body search and was taken to the hospital where hair and blood samples were taken. The defendant was placed under arrest, following which the defendant asked if he would be charged with vehicular homicide. The defendant called his wife, telling her he had confessed to vehicular homicide and would be home in a couple of hours.

The following day, July 12, 1996, the defendant was questioned by Agent Murray, who readvised him of his Miranda rights before the interview. The defendant confirmed his statements of the previous day and gave a second written statement in which he admitted that the victim had been in the passenger seat of his vehicle on July 8. He stated that they talked for about five minutes. He said she got out of his car because she said her mother had to go to the doctor. The defendant told Agent Murray that after the victim got out of his car, he ran over her.

Also on July 12, the defendant went with the investigators to the area where he said he had run over the victim. The defendant also showed investigators where he claimed to have thrown the victim's body into the river. The defendant reenacted the events of July 8 at the site visit. The defendant's court-appointed attorney was present during the site visit.

In addition to the defendant being considered a suspect, the Meyers were also initially considered suspects but were ruled out early in the investigation. Quinton Donaldson, a friend of

the defendant, was also a suspect. Donaldson drove a white Camaro and was in the Cumberland Heights area on the day of the victim's disappearance. In fact, an officer spotted the Camaro parked at a residence a couple of miles away from the Meyer's residence and stopped and questioned Donaldson during the initial search for the victim on July 8. Later, Donaldson gave a written statement to Agent Puckett in which he stated that he was the person who threw the victim's body into the river, but he ultimately recanted that statement, denying having any involvement in the victim's disappearance.

During the search of the defendant's white Chevrolet Celebrity, authorities found a hand-held telescope, a cellular telephone power cord, and a cigarette lighter cellular telephone charger. Later, when the vehicle was processed, they found Doral-brand cigarette butts in the ashtray and an empty Doral wrapper stuck over the visor. They also found a Motorola cellular telephone, a can of glass cleaner, and a Tennessee map open to the Middle Tennessee region, including the Land Between the Lakes area. A floor mat was on the driver's side of the vehicle but not on the passenger's side. The vehicle was also searched for trace evidence, including glass, hair fibers, shoe tracks, and tire tracks. No fingerprints were found in the white Chevrolet that matched either the defendant or the victim. The defendant's 1984 blue Oldsmobile was also vacuumed for fibers. The authorities also searched the defendant's residence where a scanner radio was found. Carpet fibers were taken from the residence.

In addition to giving a statement to law enforcement officials, the defendant spoke to several other people about his role in the victim's disappearance. On July 14, 1996, the defendant's mother, Cynthia Schexnayder, and his half-brother, Martin Schexnayder, traveled to Tennessee to meet with the defendant in jail. The defendant recounted the same story to his mother that he had given the police in his written statement. He told her not to worry because "all they could get him for was vehicular homicide." He told his half-brother that he had cut grass near a park and was leaving when he backed over a little girl.

David Ross testified that as a reporter for the Clarksville Leaf Chronicle, he covered the victim's disappearance and talked with investigators and the victim's family. He said that in August 1996, he talked with the defendant by telephone. The defendant told Mr. Ross that he told the police that he had run over the victim in order for them to let him go home. The defendant admitted to Mr. Ross that the victim had been in his car, but he said he last saw her walking down the hill toward the woods. He denied knowing where the victim's body was but "figured" it would be in the water somewhere. He also said that he did not believe that the police were really looking for her.

The defendant sent a letter addressed to Wilbur Meyer, Jeannie Meyer's husband, from jail. The letter read as follows:

> Wilbur, don't ask me why I am writing this letter because you are just as hard-headed as T.B.I, F.B.I, and Montgomery County police. I apologize for saying I did something I didn't. I saw them on T.V. accusing you and your wife of selling her for drugs. That really

> pissed me and my wife off. I just had a feeling that if she died, she would be in the river because of dreams that I had and the configuration of the land. That's why I got on T.V. as soon as I did.
>
> I am going to close this letter now, but if you will do a one-hundred and eighty degree turn, you might find her. You are wasting too much energy trying to blame me. I didn't hurt her in any way. I told the police over and over that that's the last time I saw her was in my rear view mirror by the mud hole. When you do find her, you will see or she will tell you that I had nothing to do with this. Sincerely, Glenn. P.S. Help me and I will help you. See if you can get my wife to talk to me . . . Call her and if she will talk to me, I will help you in any way that I can.

He also placed several collect calls to the Meyer residence. The Meyers testified that they spoke with the defendant, hoping to find the victim. The defendant also left several messages for his wife in which he stated that if she would talk to him, he would tell her what happened, tell her the truth. He also left messages that he would tell her where the victim could be found.

On November 8, 1996, Jerry Lee Brown and his son were scouting for deer in the Land Between the Lakes area when they found a human skull. They reported their finding to Leeman Lyons, an employee of the Forestry Open Land and Wildlife. Mr. Lyons immediately called for a patrol car to go to the area where the skull had been found, and he also went to the area with the Browns and TVA police officer Joe Bridges. The witnesses described the area where the skull was located as a densely wooded area approximately one-half mile from a logging road. Detective Billy Batson testified that the area in question was several hundred yards from the Cumberland River and was approximately 48.5 miles from the area where the victim disappeared.

TVA Investigator Greg Mathis took photographs of the crime scene area and found a pair of teal-colored shorts on November 8. The crime scene was not processed, however, until the following day. During the search of the area, two sandals, a Minnie Mouse T-shirt that was turned inside out, additional bones, two cigarette butts, an earring backing, a plastic tobacco container, black plastic tape, and a hair mass were found. The tobacco container, the Doral-brand cigarette butt, and the black tape were not found in the immediate area of the remains. One cigarette butt was found near the skull, but it was unmarked and was older and more deteriorated than the Doral-brand butt. The Doral-brand cigarette butt was found approximately one hundred to three hundred yards from the crime scene and was in better condition, even having ashes on it.

Forensic anthropologist Dr. Murray K. Marks headed the testing of the skeletal remains. Dr. Marks arrived at the scene and discovered the remains "sandwiched between two layers of leaves," the bottom layer from the year before and the top layer from the fall of 1996. The remains were scattered around the scene, which is common where a person dies in the woods and remains for a long period of time. Dr. Marks examined the skull and found that the victim was between 7.4 and

8.7 years of age. The victim had both baby and permanent teeth. The victim was a Caucasian, but he could not determine the victim's gender. Dr. Marks concluded that the remains had been in the area between three and nine months. He examined the victim's dental records from 1993, but could not make a positive identification from the records. At trial, Dr. Marks explained that the records were from 1993, and children change dramatically in three years. However, he could not rule out the possibility that the remains were those of the victim. Jeannie Meyer identified the shoes, T-shirt, and shorts found at the scene as her daughter's clothing.

TBI forensic scientists examined the articles of clothing found at the site, but fibers from the clothing could not be matched to fibers taken from the defendant's vehicle. TBI officials did, however, find the presence of semen inside the crotch area of the shorts recovered from the site. Mark Squibb, a serologist formerly with the TBI, testified at trial that he found fibers that he believed were hair inside the shorts. A DNA profile could not be obtained from the semen stains. Furthermore, DNA testing on the cigarette butt found near the remains was inconclusive. A DNA profile was obtained from the Doral-brand butt, and the defendant was excluded as a possible donor for that butt.

Forensic serologist Meghan Clement tested teeth recovered from the scene. Ms. Clement compared the DNA sequence derived from the teeth with a blood standard submitted by Jeannie Meyer. Clement determined that there was a maternal relationship between Ms. Meyer and the donor of the teeth. Dr. Robert Lee, the Stewart County Medical Examiner, issued a death certificate for the victim. He concluded that the cause of her death was unknown.

FBI scientist Max Michael Houck tested fiber samples vacuumed from the defendant's car and the defendant's carpet at his residence and compared them with fibers taken from the victim's shorts. He identified light yellow carpet fibers in the samples taken from the defendant's car and residence that "exhibited the same microscopic characteristics and optical properties" as fibers taken from the victim's shorts. Although he could not identify the source of the fibers, the fibers appeared to have the same properties and characteristics as samples taken from the living room carpet in the defendant's residence. Agent Houck testified that either the victim's shorts had been in the defendant's living room, or the fibers had been transferred to the shorts through contact. He explained that the fibers could have been transferred to the defendant's car via the defendant's shoes or clothing and then transferred to the victim's shorts if she came into contact with the defendant's car. Additionally, FBI chemist Ronald Menold tested the fibers forwarded to him by Agent Houck. He found the fibers from the victim's shorts and the vacuumings of the defendant's car and residence to be consistent in polymeric composition.

The defendant offered proof at trial that he was searching for a job on July 8, 1996. Edra Landon testified that while she was working at Shelby's Riverside 66 service station on July 8, 1996, a man dressed in a work uniform and driving a blue four-door truck entered the station to apply for a job between 4:00 and 4:15 p.m. She said it was a Monday. She saw the composite drawing of the suspect in the victim's disappearance and called the police to advise that he had been in the service station on July 8. She admitted on cross-examination that she could not be one hundred percent sure

that the defendant was the man who came into the store that day. She testified that only one person responded to their ad for employment. Robert Landon confirmed his wife's account. He testified that the man who visited the service station was wearing blue pants and a mechanics shirt. He talked to the man for approximately twenty minutes. He felt pretty sure that the man who came in looking for work was the defendant. Once he realized that the defendant had been in the store, he called Wilbur Meyer, the victim's stepfather, who was a friend of his. Ms. Landon's father, Eddie Kingins, also testified that he was at the store between 3:30 and 4:00 p.m. on July 8, 1996, and saw the defendant in the store. He also testified that the defendant was driving a blue four-door pickup truck. When he saw the defendant on the news two or three days later, he called his daughter.

On rebuttal, Investigator Billy Batson testified that the defendant had stated that he had worn blue jeans and a maroon and green tank top and tennis shoes on July 8, 1996. The defendant had never suggested to Investigator Batson that he stopped at the service station to inquire about employment. Further, there was no evidence that the defendant ever owned or used a blue pickup truck.

Based on the foregoing evidence, the jury found the defendant guilty of first degree premeditated murder, first degree felony murder in the perpetration of a kidnapping, first degree felony murder in the perpetration of a rape, especially aggravated kidnapping, rape of a child, and two counts of criminal impersonation.

Sentencing phase

During the sentencing phase of the trial, a criminal prosecutor from Gwinnett County, Georgia, testified that the defendant had entered guilty pleas on two counts of aggravated assault in Gwinnett County, Georgia on April 12, 1991. The prosecutor testified that in Georgia the elements of aggravated assault involve the use of violence to the person.

Jeannie Meyer testified that she lost her job as a result of her daughter's disappearance and murder and has remained unemployed since that time. Additionally, her husband had taken off from work to assist in the search for her daughter. She testified that her two sons, Joshua and Jeremy, had experienced severe psychological trauma as a result of their sister's death. Jeremy had been diagnosed with post-traumatic stress disorder, depression, and anxiety. He had also been confined to several mental hospitals, boys' homes, and juvenile homes. Joshua, the oldest son, was very angry over his sister's death.

Ms. Meyer explained that she could not sleep for a long time following her daughter's disappearance and felt powerless to protect her children. In addition to suffering from nightmares following her daughter's disappearance, she also felt very guilty and regretted letting her go outside. She testified that her daughter was a friendly, happy, and well-liked child. Additionally, she was also very talented. She could play the guitar, organ, and drums and sang a solo in church every year.

The defense called Mildred Denise Rogers to testify. Ms. Rogers is the defendant's sister. She testified that she was now known as Samuale "Sam" Roger, but her legal name remained Mildred Denise Rogers. She explained that she and her brother grew up in Louisiana and that she was two years old when her parents divorced. Her mother remarried Danny Schexnayder. Ms. Rogers was not fond of her stepfather, but the defendant was always nice to him. The defendant tried to gain the attention of Schexnayder, but he ignored the defendant. During the marriage, Schexnayder became demanding, and their mother was only affectionate to them when Schexnayder was not around.

The Schexnayders had two children together, Danny, Jr. and Martin. The defendant was not allowed to play with Danny, Jr. It was following Danny, Jr.'s birth that Schexnayder became "physical" with the Rogers children. Ms. Rogers witnessed Schexnayder pick up the defendant, spank him, and drop him to the floor. At this time, the defendant was five or six years old, and he started to withdraw. Schexnayder would also hit the defendant in the face. Although Ms. Rogers would yell at Schexnayder for hitting the defendant, their mother never intervened.

When the defendant was nine or ten, he ran away from home. Thereafter, his mother and stepfather would chain him to his bed. On one occasion, the defendant was chained to his bed for a couple of days. When the defendant would wet the bed, Schexnayder would take the mattress out to the front yard and push the defendant's face into it. He would chide the defendant by telling him that they were going to let everyone know that he wet the bed. On one occasion, Schexnayder made a sign saying the defendant had wet the bed and made him wear it for all the neighbors to see. The defendant also began to defecate in his pants, and Schexnayder would rub the pants in the defendant's face. Mildred Rogers testified that Schexnayder began to hit the defendant with anything that was within reach. She recalled that the defendant would often sit on his bed, holding his knees, and rock back and forth. When the defendant was fifteen, Schexnayder beat him with a pole until the defendant was bloody.

Ms. Rogers testified that after the Schexnayders had children together, she no longer felt that she and the defendant were a part of the family. They were often deprived of food and told they could not eat because their father had not sent their child support check. She remembered that on one occasion their biological father tried to visit them, but when he arrived, their mother called the police, telling them that he had not paid his support payments. As a result, they did not get to see their father. Schexnayder threatened to kill them if they told their father anything. Ms. Rogers recalled that one Christmas their father sent her a drum set and the defendant a dirt bike. Shortly thereafter, Schexnayder broke the drum set and sold the defendant's dirt bike. The defendant soon began stealing motorcycles in the neighborhood.

Ms. Rogers testified that she was sexually abused by Schexnayder's brother, Kenneth. She did not know if the defendant was sexually abused also, but he would hide under the house when Kenneth visited. Although their mother took them for counseling once, she became angry and left when the therapist suggested that she needed help.

Ms. Rogers began to steal and write bad checks once she left home. She had attempted suicide on several occasions and was confined to a mental hospital. She had been diagnosed with multiple personality disorder and was receiving treatment. She had also been diagnosed with bipolar disorder, manic-depressive disorder, and borderline personality disorder. She had not been in any legal trouble for ten or twelve years at the time of her testimony.

Ms. Rogers testified that the defendant had gone AWOL from the Navy in 1980. During that time, he had a serious automobile accident. He received head and eye injuries as a result of the accident. She acknowledged that although she had suffered an abusive upbringing, she had never murdered or raped a child.

Lazarus Rogers testified that he married the defendant's mother, Cynthia, when she was fifteen or sixteen and he was thirty-one or thirty-two. They divorced in 1961 before the defendant was born. After the divorce, Cynthia returned and told him she was pregnant with his child. They reconciled, and the defendant was born in March 1962. In September of that year, they remarried. Cynthia later told him that the defendant was not his son. In 1964, Cynthia left him again and took the children. In 1969, Cynthia asked him for a divorce. At the time, she was living with a man she called her husband and with whom she had two children. Although he had not paid child support, she had let him see the children until that time. Mr. Rogers testified that the defendant called him on occasion and told him that his mother was not good to him, but Mr. Rogers claimed not to know what was going on in the house.

Mr. Rogers testified that the defendant ran away to his house once. The defendant told him that his stepfather tried to beat him with a coat hanger. He said that the defendant was very withdrawn and that he attempted to get a psychological evaluation on the defendant when he was 14.

Mr. Rogers testified that the defendant's current wife was much older than the defendant and that she was very dominant. He testified that he was in the restaurant on July 8 when the defendant came in. He recalled that the defendant told his wife that he was going to a cabinet shop to look for work, and Mrs. Rogers became angry because she did not want him to go.

The defendant's aunt, Peggy Ruth Page, testified that she never saw her sister, Cynthia, show any affection toward the defendant or his sister. She acknowledged that she knew there was child abuse in the Schexnayder home. She further testified that on more than one occasion the defendant was chained to his bed. Although the defendant never told her so, she believed that he had been sexually abused.

The defendant's cousin, Deborah Lynn Miller, testified that she was six years older than the defendant. She confirmed that there was unequal treatment of the Rogers children and the Schexnayder children. She testified that the defendant's stepfather often yelled at him and called him names. Although she had never witnessed abuse, she was later told that the children were abused. She also testified that the defendant's mother told her that she did not love the defendant.

Two of Mildred Rogers's friends testified. They corroborated the earlier witnesses' testimony that the defendant and his sister were not given attention by the Schexnayders. One of the friends, Lynelle Meadows, testified that she believed that both the defendant and Mildred Rogers had been sexually abused by their uncle Kenny.

The defendant's elementary school principal, Victoria Meares, testified that the defendant was a discipline problem. She testified that the defendant would often bite other children and was called "Wolfie." She referred the defendant to a mental health clinic for counseling, but she did not know if he ever received counseling. She testified that the defendant was not able to interact with other children in an appropriate way and lacked social skills. Although the defendant's mother was nice, Ms. Meares did not believe that the parents gave her consistent, positive support in dealing with the defendant's problems. She never saw any signs of physical abuse, and the defendant never reported any abuse.

Thomas Neilson, Ph.D., a clinical psychologist, was retained by the defense to evaluate the defendant. Dr. Neilson spent twenty-four hours examining the defendant. He also interviewed the defendant's sister and her therapist and reviewed extensive records collected by the mitigation specialist. Dr. Neilson testified that the defendant's life had been very unstable. His parents divorced when he was very young, and he changed homes very often. He lived in nine different homes the first ten years of his life and attended ten schools, including five elementary schools. He did not have a chance to form friendships. As a result of the foregoing, he experienced feelings of insecurity and abandonment.

Dr. Neilson testified that the defendant performed poorly in school and received bad grades for conduct. He was suspended several times for his conduct, including biting and hitting. Dr. Neilson surmised that although he received some group therapy and speech therapy, the defendant changed schools so often that the school system never had a real opportunity to respond to his problems.

Dr. Neilson testified that the defendant suffered physical, sexual, and emotional abuse. Both the defendant and his sister reported being beaten by their stepfather. Moreover, the defendant's mother did little to protect him from the abuse. Dr. Neilson testified that both the defendant and his sister feared for their lives, which had a significant effect over time. The defendant reported that his stepfather beat him about the head with a baseball bat, and the defendant's sister said that she had seen the stepfather hold the defendant against the wall and cut off his air until he passed out. Dr. Neilson stated that the police were called to the Schexnayder's home forty times between 1972 and 1979. According to Dr. Neilson, the police records indicated the Schexnayder home was a "very chaotic home environment."

Dr. Neilson testified that the defendant said he and his sister were treated much differently than their half-brothers. The defendant said that he was often punished for the acts of his half-brothers and that he and his sister went unfed on several occasions. The defendant stated that he was often chained to his bed and that he would howl out of frustration. As a result, he was given the

nickname "Wolf." Dr. Neilson also said that the defendant began to steal motorcycles in the neighborhood after his stepfather sold the dirt bike that his father gave him.

Dr. Neilson testified that both the defendant and his sister reported being sexually abused by their uncle. The defendant also reported that he was sexually and physically abused by the staff at Louisiana Training Institute in the late 1970s. The defendant further claimed to have been sexually abused by a man who gave him a ride after he ran away from home. The defendant's sister also believed that the defendant was sexually abused by a babysitter and someone who lived in the neighborhood. As a result of these instances, the defendant suffered trauma. Dr. Neilson testified that trauma can have a long-term, permanent effect on the way the brain functions, which can cause mood swings, irritability, and anger. Dr. Neilson also testified that children tend to imitate learned behavior, including violence and abuse of children.

As a result of a psychological evaluation, Dr. Neilson diagnosed the defendant with post-traumatic stress disorder, depressive disorder NOS ("not otherwise specified"), dissociative disorder NOS, and personality disorder NOS with antisocial and borderline features, also known as mixed personality disorder. Based on letters the defendant wrote to his father when he was young, Dr. Neilson believed the defendant dissociated. The defendant signed the letters "William Little" and stated in the letters that he had two personalities – "Billy" and "William." Although Dr. Neilson concluded that the defendant dissociates, he doubted that he had "full blown dissociative identity disorder." Dr. Neilson assigned the defendant a GAF, global assessment of functioning, of fifty, which is severely impaired.

On cross-examination, Dr. Neilson acknowledged that this case was his first criminal forensic case. He also admitted that in preparing his report, he relied upon a lot of information supplied by a capital mitigation specialist. Dr. Neilson did not personally interview the defendant's mother, stepfather, siblings or wife, but relied upon the mitigation specialist's interviews of those people.

Dr. Neilson acknowledged that the defendant had spent a total of eleven years in prison during his adult life, excluding his current incarceration. The defendant had been incarcerated in Florida, Mississippi, and Georgia. During his incarceration in Mississippi, a report noted that the defendant's separate personality, "Billy," was not "an integrated separate personality, but rather an imaginary companion who gets the blame for doing antisocial things." Dr. Neilson admitted that he had never seen the defendant switch personalities. The defendant advised him, however, that he had asked "Billy" if he knew anything about the crimes against the victim, and "Billy" denied any involvement. The defendant also told Dr. Neilson that he had not committed the crimes against the victim and that he had been pressured into giving a false confession. Although Dr. Neilson did not believe that the defendant's dissociative disorder was directly related to the crimes against the victim, he said it indicated the severity of the defendant's abuse and trauma.

Dr. Neilson testified that the defendant fell within the normal range of intellectual functioning, had no intercranial abnormalities, had logical and coherent thought processes, and expressed no delusional or paranoid ideas. Dr. Neilson admitted that the defendant's MMPI test

results suggested that the defendant exaggerated his symptoms possibly due to a cry for help or malingering. Dr. Neilson did not believe that the defendant malingered, and he found the MMPI test results to be invalid. Dr. Neilson admitted that part of the defendant's depression could have resulted from his incarceration and the charges pending against him. Dr. Neilson further admitted that Dr. Caruso, the state's expert, had not diagnosed the defendant with any of the Axis I disorders that he found.

The defense also called Dr. Cecile Guin, a school social worker employed by Louisiana State University, to testify as an expert in the field of social work and Louisiana's conditions of confinement. Dr. Guin prepared the response on behalf of the State of Louisiana to a federal investigation regarding the treatment of children in state institutions. While the defendant was at Louisiana Training Institute (LTI) in 1978, there was severe abuse of the inmates. In fact, eight guards were terminated and three guards were indicted for beating three juveniles. She testified that children were chained to their beds, hit with belt buckles, hung on clothes-lines, and "popped" in the ear. In addition to officer-inmate violence, there was also inmate-inmate violence.

Dr. Guin testified that the Louisiana juvenile facilities were essentially racially segregated in 1978 but that the defendant, a Caucasian, had been put into the facility housing African-Americans with the most serious offenses. The institution did not provide adequate counseling or treatment programs during the time the defendant was there. The defendant told Dr. Guin that he had watched other inmates be abused and that he was unable to sleep at night because of fear. He told Dr. Guin that people had attempted to abuse him sexually in the facility, but he denied ever being raped or sexually abused.

Dr. Guin admitted on cross-examination that the defendant was at LTI for only eleven days before the beating of the three inmates, which spurred the investigation into the facility. Following that time, the facility was watched very closely.

Dr. Keith Caruso, a forensic psychiatrist, testified on behalf of the state. He interviewed the defendant, his sister, his father, his estranged wife, and his high school principal. He also reviewed the defendant's prison records, school records, medical records, mental health records, military records, police reports, and witness statements. Dr. Caruso diagnosed the defendant with anti-social personality disorder and borderline personality disorder. Dr. Caruso testified that people with borderline personality disorder are sensitive to abandonment with a tendency to feel empty. He testified that the defendant felt abandoned by his biological father and rejected when his sister left home. He said the defendant felt rejected when his first marriage ended and feared his marriage to Mrs. Rogers was in jeopardy. At the time of the crimes in this case, the defendant was in an abandonment crisis. Not only was the defendant fearful of his marriage ending, he was fearful that he was going to lose the renewed relationship he had built with his biological father. According to Dr. Caruso, Mrs. Rogers, the defendant's current wife, was a mother figure to him. At the time of the crimes, the defendant was symbolically being abandoned by both his mother and father again. Dr. Caruso theorized that the murder of the victim was a response to feeling so abandoned, which caused the defendant to act out in ways that had been modeled for him.

Dr. Caruso did not diagnose the defendant with post-traumatic stress disorder because he did not exhibit all of the symptoms. Also, Dr. Caruso did not believe that psychotic or dissociative symptoms played a role in the crimes committed in this case.

Dr. Mark Cunningham, a clinical and forensic psychologist, testified regarding a violence risk assessment he performed on the defendant. He testified that if the defendant were sentenced to life imprisonment, he would be a capital offender in the general prison population and would be a long term inmate. The defendant was thirty-seven years old, and his age would substantially reduce his risk level compared to other inmates. Further, the defendant did not have a history of assaultive behavior while in prison, but he did have a history of minor disciplinary problems. He also had a history of threatening to retaliate against other inmates who threatened him. Dr. Cunningham concluded that the defendant had an eight to seventeen percent chance of committing a violent act of a serious nature while in prison. He admitted on cross-examination that the defendant would be a "significant risk" if left in the community. He agreed that if the defendant were in prison until a very old age, he would not likely commit future violent crimes. Dr. Cunningham also admitted that the defendant had previously escaped from prison, which he considered as a factor against the defendant. However, Dr. Cunningham did not believe that the defendant's prior prison escape, his prior criminal record, or his history of incarceration was a good predictor of violent conduct in prison.

Juanita Rogers was called by the state as a rebuttal witness. During her testimony, a letter was read into the record that the defendant wrote to her while he was awaiting trial. The defendant told her that if he had to "do time," he would either be killed trying to escape from prison or he would kill himself. She also testified that during her marriage to the defendant, he never told her that he had been physically or sexually abused.

Lisa Sanders, the defendant's ex-wife, testified as a rebuttal witness for the state. During their marriage, the defendant never told her he had been physically or sexually abused.

The state called Dr. William Bernet, who diagnosed the defendant with dissociative disorder, pedophilia, malingering, and anti-social disorder. Dr. Bernet testified that he believed the defendant was malingering his dissociative disorder in order to make it seem worse than it was. Dr. Bernet did not believe that the defendant was under extreme mental or emotional distress at the time of the crimes in this case, and he did not believe that a connection existed between the defendant's dissociative disorder and the crimes committed against the victim. Dr. Bernet also stated that no direct connection existed between the defendant's difficult childhood and the crimes against the victim. According to him, the two factors that played a role in the defendant committing the crimes against the victim were the defendant's anti-social personality disorder and pedophilia.

I. SUFFICIENCY OF THE EVIDENCE

The defendant challenges the sufficiency of the convicting evidence. The defendant contends the evidence is insufficient to prove the convictions of premeditated murder, felony murder,

especially aggravated kidnapping, and especially aggravated robbery. The defendant relies primarily on the fact that the evidence was circumstantial. The state argues that the evidence is sufficient. We agree.

Our standard of review when the defendant questions the sufficiency of the evidence on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). We do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions about witness credibility were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). A conviction may be based entirely on circumstantial evidence where the facts are "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." State v. Reid, 91 S.W.3d 247, 277 (Tenn. 2002) (quoting State v. Smith, 868 S.W.2d 561, 569 (Tenn. 1993)).

A. First degree premeditated murder and murder in the perpetration of kidnapping

The defendant contends that the circumstantial evidence in this case is insufficient to convict him of premeditated first degree murder and murder in the perpetration of kidnapping. He bases this argument on the fact that he confessed to an accidental killing of the victim. The defendant asserts that the "proof does not exclude the reasonable hypothesis that the victim was accidentally killed (as the defendant alleged [in his statement]) and that she was already dead when she was transported from the place where the accident occurred." The record is devoid, however, of proof that the victim was dead when the defendant left the area of the Meyer residence with the victim in his car.

The record shows that approximately five days before the victim's disappearance, the defendant introduced himself to the victim as a police officer. The defendant offered to take the victim and the other children present swimming and to shoot fireworks after meeting them briefly and without the consent of any adults. The defendant returned to the victim's residence shortly before her disappearance. After talking briefly with the victim's mother, the defendant walked to an abandoned trailer near the victim's home, rather than leaving the area. Thereafter, by the defendant's own account, the victim entered his car. The defendant admits that he was the last person to see the victim alive. The defendant contended in his statement that after the victim left his car, he accidentally backed over her. His statement implied that the victim was alive after he ran over her. However, instead of seeking medical help, he took her body and threw it over a bridge. He also contended that one of the victim's shoes came off her foot and that he threw it into the water separately. However, when the victim's remains were found 48.5 miles away, both of her shoes were found with her. The victim's T-shirt was found inside-out nearby, as if it had been taken off her. The victim's shorts had semen stains on them, and a fiber found on the victim's shorts was consistent with a fiber sample from the defendant's living room carpet. Moreover, Dr. Marks, a forensic scientist, testified that the fact that the victim's fingernails were found with the victim indicated that

her body had decomposed in the woods at Land Between the Lakes. Additionally, the victims remains were found several hundred yards from the river. Although the defendant left the area of the Meyer residence sometime shortly after 2:00 p.m., he did not return home until approximately 6:00 p.m. The defendant's wife testified that when he returned, blood was on his shirt, his pants were muddy, the car was muddy, and a child's fingerprints could be seen on the passenger side of the car's windshield. Based on the evidence, there is sufficient evidence from which the jury could have concluded that the defendant's statement that he had accidentally killed the victim was untrue. Moreover, there was sufficient evidence from which a rational jury could have concluded that the defendant kidnapped the victim near her home, drove her to the Land Between the Lakes area, and killed her with premeditation and in the perpetration of the kidnapping.

B. Rape of a child and murder in the perpetration of rape

The defendant contends that the evidence is insufficient to support the convictions of rape of a child and murder in the perpetration of rape. The defendant bases his argument on two theories: the evidence against the defendant was entirely circumstantial and the court should have allowed evidence that Jeremy Beard could have engaged in sexual acts with his sister before her disappearance and therefore could have been the donor of the semen stains found on the victim's shorts. The defendant asserts that if Jeremy Beard is not excluded as a potential donor of the semen, the proof is insufficient to establish that the defendant was the only potential donor of the semen stains. Although the rape in this case is based on circumstantial evidence, we conclude that sufficient evidence exists from which the jury could have found beyond a reasonable doubt that the defendant raped the victim and murdered her in the perpetration of the rape.

As previously noted, a conviction may be based entirely on circumstantial evidence where the facts are clearly interwoven and connected so that the finger of guilt is pointed unerringly at the defendant and the defendant alone. Reid, 91 S.W.3d at 277 (quoting State v. Smith, 868 S.W.2d 561, 569 (Tenn. 1993)). Furthermore, the defendant has the burden on appeal to show that the facts contained in the record and the inferences drawn therefrom are insufficient, as a matter of law, for any rational trier of fact to have found the accused guilty beyond a reasonable doubt. State v. Brewer, 932 S.W.2d 1, 19 (Tenn. Crim. App. 1996).

The facts supporting the rape conviction are as follows: The defendant was the last person to see the victim alive. The last known location of the victim before her remains were found in the woods was the defendant's car. Immediately before her disappearance, the victim changed into clean shorts. There is no proof in the record that anyone other than the defendant had any contact with the victim, a nine-year-old child, after she changed clothes. When the victim's remains were found, human semen stains were on the victim's shorts. Meghan Clement, an expert in forensic serology and DNA analysis, testified that she was not able to perform a mitochondrial DNA analysis on the semen stains because she could not obtain a sequence from the stain. She explained that there were four possible reasons that she was unable to obtain a sequence from the semen stain: the DNA was too degraded; there was an insufficient quantity of DNA on the sample; there was a mixture of DNA

in the sample, consisting of either two sources of semen or one source of semen and vaginal fluid from the victim; or inhibitors prevented the sequence from being obtained.

The trial court found that because the defendant admitted to numerous law enforcement officials and civilians that he was the last person to see the victim alive and because the victim's shorts were clean at the time of her abduction, the reasonable conclusion is that her abductor, the defendant, is the source of the semen. The trial court further found that according to the expert testimony, it was possible that a second source of DNA was present in the victim's shorts, and it was further possible that the victim's vaginal fluid and the perpetrator's semen were the two sources of the DNA mixture. Based on the foregoing evidence, the trial court found that "it was reasonable for the jurors to conclude that the defendant penetrated the victim with his penis, ejaculated inside her, and returned her shorts to their original position, and that the DNA discovered in the crotch area of the victim's shorts was due to a mixture of semen and vaginal fluid flowing from the victim's vagina." Given the evidence presented, we conclude that a rational jury could have concluded that the defendant raped the victim and murdered her in perpetration of the rape. The evidence is sufficient to support the convictions of rape and murder in the perpetration of rape.

C. Aggravating circumstances

The defendant contends that the evidence is insufficient to support two of the aggravating circumstances upon which the jury based the sentence of death. Specifically, the defendant contends that the finding of the aggravating circumstances set forth in T.C.A. §§ 39-13-204(i)(6) and 39-13-204(i)(7) are not supported by the evidence and are tainted by error.

The defendant correctly notes in his brief that an underlying felony must be proven in order for the jury to find that the defendant killed the victim to avoid arrest and prosecution under the aggravating circumstance set forth in T.C.A. § 39-13-204(i)(6). Again, the defendant asserts that there is insufficient evidence of the underlying rape; therefore, he maintains that insufficient evidence exists for proving the (i)(6) aggravator. We have already concluded that the evidence of rape was sufficiently proven for a conviction.

Similarly, the defendant contends that the evidence is insufficient to support a finding that the murder was knowingly committed, solicited, directed, or aided by the defendant while the defendant had a substantial role in committing or attempting to commit any rape or kidnapping, the (i)(7) aggravator. The defendant asserts that because insufficient evidence exists for the underlying rape, the finding of this aggravating circumstance is tainted by error. Again, we have determined that sufficient evidence supports his rape conviction. Accordingly, the defendant's assertions with respect to the aggravating circumstances are without merit.

Considering the evidence in the light most favorable to the state, we conclude that the proof points the finger of guilt unerringly at the defendant and the defendant alone. Therefore, the defendant's challenges to the sufficiency of the evidence are without merit.

II. CHANGE OF VENUE

The defendant contends that the trial court erred by refusing to change the venue of the trial because of adverse pretrial publicity. A change of venue may be granted if it appears that "due to undue excitement against the defendant in the county where the offense was committed or any other cause, a fair trial probably could not be had." Tenn. R. Crim. P. 21(a). A motion for change of venue is left to the sound discretion of the trial court and the court's ruling will be reversed on appeal only upon a clear showing of an abuse of that discretion. State v. Howell, 868 S.W.2d 238, 249 (Tenn. 1993); State v. Hoover, 594 S.W.2d 743, 746 (Tenn. Crim. App. 1979). The mere fact that jurors have been exposed to pretrial publicity will not warrant a change of venue. State v. Mann, 959 S.W.2d 503, 531-32 (Tenn. 1997). Similarly, prejudice will not be presumed on the mere showing of extensive pretrial publicity. State v. Stapleton, 638 S.W.2d 850, 856 (Tenn. Crim. App. 1982). In fact, jurors may possess knowledge of the facts of the case and may still be qualified to serve on the panel. State v. Bates, 804 S.W.2d 868, 877 (Tenn. 1991). The test is whether the jurors who actually sat on the panel and rendered the verdict and sentence were prejudiced by the pretrial publicity. State v. Crenshaw, 64 S.W.3d 374, 386 (Tenn. Crim. App. 2001); State v. Kyger, 787 S.W.2d 13, 18-19 (Tenn. Crim. App. 1989). Furthermore, the scope and extent of voir dire is also left to the sound discretion of the trial court. State v. Smith, 993 S.W.2d 6, 28 (Tenn. 1999). Jurors who have been exposed to pretrial publicity may sit on the panel if they can demonstrate to the trial court that they can put aside what they have heard and decide the case on the evidence presented at trial. State v. Gray, 960 S.W.2d 598, 608 (Tenn. Crim. App. 1997).

In State v. Hoover, 594 S.W.2d 743 (Tenn. Crim App. 1979), this court set forth the factors which should be considered to determine whether a change of venue is warranted. The Hoover court listed the following seventeen factors: the nature, extent, and timing of pretrial publicity; the nature of the publicity as fair or inflammatory; the particular content of the publicity; the degree to which the publicity complained of has permeated the area from which the venire is drawn; the degree to which the publicity circulated outside the area from which the venire is drawn; the time elapsed from the release of the publicity until the trial; the degree of care exercised in the selection of the jury; the ease or difficulty in selecting the jury; the venire person's familiarity with the publicity and its effect, if any, upon them as shown through their answers on voir dire; the defendant's utilization of his peremptory challenges; the defendant's utilization of challenges for cause; the participation by police or by prosecution in the release of the publicity; the severity of the offense charged; the absence or presence of threats, demonstrations or other hostility against the defendant; the size of the area from which the venire is drawn; affidavits, hearsay or opinion testimony of witnesses; and the nature of the verdict returned by the trial jury. Again, however, for there to be a reversal of a conviction based upon a claim that the trial court improperly denied a motion for a change of venue, the "defendant must demonstrate that the jurors who actually sat were biased or prejudiced against him." State v. Evans, 838 S.W.2d 185, 192 (Tenn. 1992).

The defendant contends that pretrial publicity concerning his criminal history, including allegations of prior sexual abuse of children, was highly prejudicial and inadmissible. The defendant also asserts that the community from which the jury was drawn was a small community that had

three cases of missing children, all young girls, at the time of the victim's disappearance, which caused a climate of undue excitement. Most of the pretrial publicity concerning this case was published during the victim's disappearance. The selection of the jury included questions to determine if any potential juror had been prejudiced by pretrial publicity. The defendant does not cite to any area of the record to support an allegation that the jury panel was prejudiced by pretrial publicity. In fact, he does not even allege that any of the jurors who sat on his case were prejudiced by the pretrial publicity cited. After our review of the record, we cannot find any proof that any of the jurors were prejudiced. Mere speculation that some of the jurors may have been exposed to pretrial publicity does not warrant a new trial. See Crenshaw, 64 S.W.3d at 386. The record fails to support the defendant's allegation that the jury panel was prejudiced by pretrial publicity.

III. DEFENDANT'S STATEMENTS TO POLICE

The defendant contends that the trial court erred in failing to suppress his oral and written statements to the police following a polygraph examination. He argues that the authorities' interrogation of him changed from non-custodial to custodial following a polygraph examination. The defendant admits that approximately three to three and one-half hours before the polygraph test, while he was being interrogated in a non-custodial setting, the police had properly Mirandized him. However, the defendant contends that because he was given no further Miranda warnings following the polygraph examination and change in status of the interrogation, his subsequent statements to the police should have been suppressed.

On July 11, 1996, Sergeant Clifton Smith visited the defendant at his place of employment to ask him questions about the victim's disappearance. Following a conversation with Sergeant Smith, the defendant agreed to speak with him at the Criminal Justice Center. The defendant drove himself to the Criminal Justice Center, where he met and spoke with several officers from differing law enforcement agencies.

Soon after questioning began, the defendant said that he was the man for whom they were searching, the man depicted in the composite sketch that had been published. Sergeant Smith then read the defendant his Miranda rights. The defendant signed a form waiving his Miranda rights, and he signed forms consenting to a search of his vehicle and his residence. The time noted on the waiver of rights form is 11:18 a.m. Upon further interrogation, the defendant admitted that he had been in the area where the victim was last seen, but he denied any involvement in her disappearance.

After the defendant was advised of his rights, F.B.I. Special Agent Brett Murray questioned the defendant. The defendant went with Agent Murray and other officers to his residence for the search. While at the defendant's residence, Agent Murray asked the defendant to consent to a polygraph examination, and the defendant consented. The defendant then accompanied Agent Murray to the federal building for the administration of the polygraph examination. Before the polygraph test, Special Agent Hooker obtained the defendant's written consent to administer the test. The defendant was not readvised of his Miranda rights. Agent Hooker conducted the polygraph examination of the defendant at approximately 2:35 p.m. on July 11, 1996. Agent Hooker testified

that he did not advise the defendant of his rights before the examination because the defendant was not in custody and was free to leave.

Following the polygraph examination, Agent Hooker advised the defendant that some of his answers indicated deception. Thereafter, the defendant told Agent Hooker that he had hit the victim with his car, driven over her, and killed her. Agent Hooker requested that Agent Murray and Investigator Batson enter the room and question the defendant. The defendant was interrogated at length by them, and he made several additional incriminating statements. In those statements, the defendant said that he had accidentally run over the victim, that she had difficulty breathing when he placed her in the passenger side of his car, and that he had driven her to a bridge over the Cumberland River where he threw her body into the water. Around 3:30 or 4:00 p.m., the officers asked the defendant to reduce his statements to writing, and the defendant complied. Agent Murray testified that the defendant was not threatened, intimidated, or promised anything in exchange for his statements. Agent Hooker confirmed Agent Murray's testimony. Agent Murray further testified that after the defendant gave his written statement, he considered the defendant to be under arrest and not free to leave. Investigator Batson testified that because he was under the impression that the defendant had been advised of his rights before the polygraph test, he did not repeat them after the test. Agent Puckett also interrogated the defendant following the polygraph test, and he testified that he understood that the defendant had been advised of his rights before the test. He said he was not aware of when the Miranda warnings had been given. All of the officers agreed that the defendant was not intoxicated at any point during the interrogation. They further testified that he was not coerced into giving the statement or threatened during the interrogation.

On July 12, 1996, the day following the polygraph examination, the defendant was questioned by Agent Murray. Agent Murray readvised the defendant of his Miranda rights before the questioning. During this questioning, the defendant basically confirmed his previous statements, but he also gave an additional statement. In it, he corrected his earlier statement by adding that the victim had been in his car before the accident for about five minutes, during which time they talked. Later that same day, the defendant, accompanied by his appointed attorney, went with law enforcement officials to the Meyer residence where he reenacted his account of what happened on July 8, 1996. The defendant then accompanied the officers to the bridge from which he claimed he had thrown the victim's body. The defendant's account of the events leading to the victim's death was consistent with his statements from the previous day.

The defendant filed a pre-trial motion to suppress his oral and written statements. In ruling on the motion, the trial court determined that the defendant had not been coerced into giving the statements, was not held for an unusually long period of time, was not deprived of food or water, and was not harmed by the officers. The court further ruled that additional Miranda warnings were not required under the circumstances of the case.

The defendant essentially gave two sets of statements: the statements given on July 11, 1996, following the polygraph examination and the statements given on July 12, 1996. The statements given following the polygraph examination were given several hours after the defendant had been

advised of his Miranda rights. None of the law enforcement officials readministered the Miranda warnings before the polygraph examination or before interrogating the defendant immediately following the examination. The United States Supreme Court has ruled that there is no per se rule requiring police to readminister Miranda warnings before a post-test interview with the polygraph examiner, but rather, the question of voluntariness and the adequacy of the warnings should be decided by looking at the totality of the circumstances. Wyrick v. Fields, 459 U.S. 42, 103 S. Ct. 394 (1982). This court has held that additional Miranda warnings were not required during a post-polygraph interrogation when the interrogation was deemed to be non-custodial. See State v. David J. Forrester, No. 01C01-9801-CC-00031, Humphreys County (Tenn. Crim. App. Apr. 29, 1999).

A defendant's right against compelled self-incrimination is protected by both the United States and Tennessee Constitutions. State v. Blackstock, 19 S.W.3d 200, 207 (Tenn. 2000). As our supreme court has explained:

> In Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694 (1966), the United States Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." The procedural safeguards must include warnings prior to any custodial questioning that an accused has the right to remain silent, that any statement he makes may be used against him, and that he has the right to an attorney.

Blackstock, 19 S.W.3d at 207. However, the rights protected by Miranda may be waived by an accused if the waiver is made voluntarily, knowingly, and intelligently. Miranda, 384 U.S. at 444, 86 S. Ct. at 1612. Whether a waiver has been made voluntarily, knowingly, and intelligently must be determined by the totality of the circumstances surrounding the interrogation. State v. Van Tran, 864 S.W.2d 465, 472-73 (Tenn. 1993); State v. Benton, 759 S.W.2d 427, 431-32 (Tenn. Crim. App. 1988). Further, a trial court's decision on a motion to suppress will be upheld unless the evidence in the record preponderates against it. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996).

The trial court in this case found that the defendant had not been coerced into giving the statements, was not held for an unusually long period of time, was not deprived of food or water, and was not harmed by the officers. The court also ruled that additional Miranda warnings were not required under the circumstances of the case. Nothing in the record indicates that the oral and written statements given to the law enforcement officers following the post-polygraph interview were not voluntarily, knowingly and intelligently made. The defendant asserts that he should have been given additional Miranda warnings before the statements were given. However, the defendant had been given the warnings approximately five hours before making the statements, and he had waived his rights. Law enforcement officials are not required to give an accused repeated Miranda warnings during an interrogation once the accused has been advised of the rights and has waived

them. See State v. Aucoin, 756 S.W.2d 705, 709-10 (Tenn. Crim. App. 1988); State v. Pride, 667 S.W.2d 102, 104 (Tenn. Crim. App. 1983); Reaves v. State, 523 S.W.2d 218, 220 (Tenn. Crim. App. 1975); State v. Willie Claybrook, No. 3, Crockett County (Tenn. Crim. App. Feb. 5, 1992), app. denied (Tenn. May 4, 1992). Accordingly, the trial court did not err in denying the defendant's motion to suppress the statements.

In any event, we note that the defendant also confirmed his statements the next day after having been readvised of his Miranda rights and made new statements. Furthermore, the defendant accompanied law enforcement officials to the area where he alleged he had run over the victim with his car and to the bridge from which he alleged he had thrown the victim's body. At each of the sites, he reenacted his version of what had transpired on the day the victim disappeared. These reenactments were consistent with the oral and written statements he had previously given. Significantly, the defendant's court-appointed attorney was present with him during the reenactments. A review of the record reveals no evidence that the July 12 statements were involuntarily made. Accordingly, the statements, which confirmed and included the previous day's statements, need not be suppressed.

IV. DEFENDANT'S STATEMENTS TO THIRD PERSONS

The defendant contends that the trial court erred in refusing to suppress statements he made to his family, the victim's family, and the press while he was in jail. He asserts that members of his family, the victim's family, and the press acted as agents of the state in securing statements from him, and, accordingly, the statements should have been excluded from the trial.

The proof shows that after defendant's arrest, he made collect telephone calls to the victim's mother, Jeannie Meyer, and Ms. Meyer's husband, Wilbur Meyer, from jail. After the telephone calls began, the Meyers contacted the authorities to determine if they could record the calls. There is no proof that the law enforcement officials suggested that the Meyers record the conversations or even continue to accept the collect calls. In fact, Ms. Meyer testified that two officers advised that she did not have to talk with the defendant, and one of those officers even urged her not to speak with the defendant. Ms. Meyer said she continued to accept the calls because she wanted to locate her daughter's body. The Meyers testified that they gave the tapes to the authorities to help with the investigation. The state did not introduce the tape recordings at trial. Additionally, the defendant sent a letter to Wilbur Meyer in which he denied killing the victim.

The defendant also contacted reporter David Ross, who worked with the Clarksville Leaf Chronicle. Mr. Ross interviewed the defendant and tape recorded the interview. Mr. Ross testified that no one encouraged or requested him to speak with the defendant. He did not contact any law enforcement authorities about his interview until it was completed. He testified that he only turned over a transcript of his interview to authorities for the purpose of helping to locate the victim's body. Mr. Ross admitted that he spoke with the Meyers and shared information with them. The defendant asserts that Mr. Ross "through the Meyers, also became a state agent."

Finally, the defendant contends that his own mother and step-brother became state agents when they drove to Tennessee from Louisiana to speak with him following his arrest. The defendant's step-brother testified that he met with the defendant in an attempt to find out what had happened and to determine if he could help find the victim. Cynthia and David Schexnayder did not contact the authorities until after they had met with the defendant. After their meeting with the defendant, the Schexnayders agreed to give authorities a statement about their conversations.

The Sixth Amendment guarantees the accused the right to rely on counsel as a "medium" between the accused and the state following the initiation of formal charges. Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199 (1964). The United States Supreme Court and this court have held that incriminating statements may not be deliberately elicited from an accused by action of the state, as such action amounts to an interrogation. Id.; State v. Webb, 625 S.W.2d 281, 284 (Tenn. Crim. App. 1980). This court determined in Webb that the authorities had subverted the accused's right to counsel when they placed an undercover agent in a jail cell with the accused who elicited statements from the accused. Webb, 625 S.W.2d at 284. However, the facts of this case are far different from the facts in Massiah and Webb.

The state did not direct, elicit, or otherwise attempt to procure statements from the defendant through any of the subject persons. The defendant contacted the Meyers and David Ross. Neither the Meyers nor David Ross were asked by the state to elicit information from the defendant. Instead, the authorities discouraged Jeannie Meyer from communicating with the defendant. The defendant's family members, Cynthia and David Schexnayder, visited the defendant in jail on their own in an attempt to get information about the location of the victim's body. The Schexnayders did not go to the authorities with their information until following their meeting. There is no proof in the record to substantiate the defendant's arguments that the Meyers, David Ross, or the Schexnayders acted as state agents. Accordingly, the trial court was correct in concluding that the defendant's constitutional rights were not violated by the admission of statements the defendant voluntarily made to the subject parties. This issue is without merit.

V. EXCLUSION OF PROSPECTIVE JURORS FOR CAUSE

Prospective jurors Marita Washington and Jeannie Green were excused for cause by the trial court based on their opposition to the imposition of the death penalty. The defendant argues that the exclusion of these jurors violated his constitutional rights. Specifically, the defendant contends that the state failed to meet its burden of proving that these two jurors' views would substantially impair their ability to carry out the law as required by Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 852 (1985).

In determining when a prospective juror may be excused for cause because of his or her views on the death penalty, the standard is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." State v. Austin, 87 S.W.3d 447, 472 -73 (Tenn. 2002) (citing Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 852 (1985)). "[T]his standard likewise does not require that a juror's biases be

proved with 'unmistakable clarity.'" Id. at 473. However, the trial judge must have the "definite impression" that a prospective juror could not follow the law. State v. Hutchison, 898 S.W.2d 161, 167 (Tenn. 1994) (citing Wainwright, 469 U.S. at 425-26, 105 S. Ct. at 853). Finally, the trial court's finding of bias of a juror because of his or her views concerning the death penalty are accorded a presumption of correctness, and the defendant must establish by convincing evidence that the trial court's determination was erroneous before an appellate court will overturn that decision. State v. Alley, 776 S.W.2d 506, 518 (Tenn. 1989), cert. denied, 493 U.S. 1036, 110 S. Ct. 1758 (1990).

A. Prospective Juror Washington

Prospective juror Marita Washington expressed her views on the imposition of the death penalty in responses to a juror questionnaire and during individual voir dire. Ms. Washington stated on the juror questionnaire that she was opposed to the death penalty but willing to consider its imposition under appropriate circumstances. Ms. Washington also stated on the questionnaire that she was strongly opposed to the death penalty and believed it should not be imposed, but she asserted that she could set aside her personal feelings and follow the law as instructed by the court. Ms. Washington further stated on the questionnaire that she thought the death penalty should never be imposed, but as long as the law provided that punishment, she could vote to impose the death penalty if she believed "it was warranted in a particular case, depending on the evidence, the law, and what I learned about the defendant." Her questionnaire reflected that she did not believe that death was too severe a punishment for any defendant convicted of first degree murder.

The following exchange took place between the court and Ms. Washington during voir dire:

> The Court: Okay. And you have already said now - the General asked you to give an example of a kind of case where you think you could vote for the death penalty and you couldn't think of one, but if the evidence in this case was such that you felt like yes, in this case the State has proven beyond a reasonable doubt that there is one or more aggravating circumstances and they have also convinced you beyond a reasonable doubt that those -- the aggravating circumstance outweighs the mitigating circumstance, okay? And you are saying to yourself, based on that, what this instruction says is that the verdict of the jury shall be death? At that point in time, if that's how you see the case, are you going to then be saying well, I know that's what the law says and I know that's what the Judge says and we went

through all these questions but I just feel so strongly against the death penalty that I just couldn't -- I could not sign off on a form and sentence somebody to death? Think you could sign the form if you thought the proof was there?

Prospective Juror: No.

. . .

The Court: So in all honesty then, this is the last thing that I am going to ask you, I promise you. Do you feel like your personal view on capital punishment would either prevent or substantially impair the performance of your duties as a juror in this case?

Prospective Juror: Substantially impair.

The Court: Substantially impair. Okay.

The defendant contends that Ms. Washington must have misunderstood[1] the last question asked by the court, but there is no proof in the record to substantiate this allegation. Ms. Washington admitted that her personal views on the death penalty would substantially impair the performance of her duties as a juror. Thus, Ms. Washington's responses to the voir dire questioning support her dismissal under Wainwright. After reviewing the record, we conclude that prospective juror Washington met the standard for dismissal. See Hutchison, 898 S.W.2d at 167.

B. Prospective Juror Green

Prospective juror Jeannie Green responded on the juror questionnaire that she was strongly opposed to the death penalty, but she also responded that she could set aside her personal feelings and follow the law as instructed by the court. Like prospective juror Washington, Ms. Green responded that she could vote to impose the death penalty if she believed "it was warranted in a particular case, depending on the evidence, the law, and what I learned about the defendant." During voir dire, Ms. Green responded to questions regarding the imposition of the death penalty as follows:

THE COURT: All right. So, if you're a juror on this case, now, Ms. Green, and the State convinces you

[1] The defendant contends that because Ms. Washington was born in Germany, and English is her second language, she misinterpreted the question as being required to choose between the possibilities that her views would either prevent or substantially impair her performance as a juror.

beyond a reasonable doubt, first of all, that the Defendant is guilty of first degree murder and that there is one or more statutory aggravating circumstances – now, that's legal language, but that's what I'm required to explain to you at this time. And further that they convince you in your mind that the statutory aggravating circumstance or circumstances outweigh any mitigating evidence beyond a reasonable doubt, what the instructions would say to you as a juror is your verdict shall be death. You understand that's what you'd be looking at on the jury instructions?

MS. GREEN: Uh-huh. Yes.

THE COURT: Now, you've already told me that you have a personal belief that I would say is against the death penalty.

MS. GREEN: Right.

THE COURT: Would your personal belief be so strong that it would interfere with your ability to vote for a death sentence even if the evidence and the law pointed in that direction?

MS. GREEN: I have to vote against it, sir.

THE COURT: All right.

MS. GREEN: I'm sorry.

THE COURT: All right. Can you think – you don't have to apologize at all. Like I said, it's just –

MS. GREEN: Well, I will.

THE COURT: We just want to know what your view is. Would – can you think of any circumstances where you'd be able to vote for a death sentence?

MS. GREEN: If he actually come out and said he did it himself. Nobody else. No newspaper; no nothing; just him then I'd go for the death penalty.

THE COURT: Okay. So, in your mind what you're – what you're basically saying is if the defendant himself said –

MS. GREEN: Uh-huh.

THE COURT: – I killed somebody, --

MS. GREEN: Uh-huh.

THE COURT: – then you could consider for the –

MS. GREEN: Right.

THE COURT: All right.

MS. GREEN: Uh-huh

THE COURT: And, of course, now, the law doesn't say that a defendant has to admit to it.

MS. GREEN: Right. Right. I realize this.

THE COURT: But you're – I guess, we've got another little conflict here between the law and what you – what your personal beliefs might be?

MS. GREEN: Uh-huh.

THE COURT: That doesn't mean that your personal belief is wrong, but I just need to know if your personal belief would interfere with your ability to follow the law. Do you think it would?

MS. GREEN: I think so, because I am not – I'm not for the death penalty.

THE COURT: Okay.

MS. GREEN: I really am not.

. . .

THE COURT: We've got two more to go. I'll tell you what we're going to do, Ms. Green, I'm going to let the lawyers ask you a few questions.

MS. GREEN: Okay.

THE COURT: And you just keep answering them as honestly as you have to me.

MS. GREEN: Okay.

THE COURT: And then I'll figure out what to do in a few minutes; okay?

MS. GREEN: All right. Fine.

THE COURT: General Brollier?

STATE: Ms. Green?

MS. GREEN: Yes.

STATE: You've said that you're strongly opposed to the death penalty, and you're not for the death penalty. Is that based on a matter of religious faith?

MS. GREEN: Yes, I'm Catholic

STATE: Okay. And would you say that it would be difficult for you, then, to – as the Court has told you the law in the –

MS. GREEN: Uh-huh.

STATE: – State of Tennessee does impose the death penalty in some situations.

MS. GREEN: Uh-huh.

STATE: And as a Catholic you do not believe the death penalty should be imposed, I assume?

MS. GREEN: Right.

STATE: Now, so, there's a conflict between the law of Tennessee and your faith.

MS. GREEN: Right.

STATE: And you may be asked if you're a juror in this case to make a decision that would bring that conflict right, just right up to you, --

MS. GREEN: Uh-huh.

STATE: – and you'd have to decide whether you're going to follow the law or are you going to follow your faith?

MS. GREEN: Uh-huh.

STATE: Do you see it in those terms?

MS. GREEN: Yeah, I'm still against the death penalty. If it's –

STATE: Okay. That's what I'm asking.

MS. GREEN: – against the State of Tennessee I'm sorry.

STATE: So, what you're saying is you would follow the faith – your faith, your Catholic faith –

MS. GREEN: Right.

STATE: – above the law of Tennessee?

MS. GREEN: Right.

STATE: Okay.

MS. GREEN: Sure would.

STATE: Ms. Green, as I understand it then, you said – okay. I'm going to leave it at that, Your Honor. Thank you.

THE COURT: All right.

After reviewing the record, we conclude that Ms. Green met the standard for dismissal. See Hutchison, 898 S.W.2d at 167.

VI. CROSS-EXAMINATION OF THE VICTIM'S BROTHER, JEREMY BEARD

The defendant contends that the trial court violated his constitutional rights by limiting the cross-examination of the victim's brother, Jeremy Beard, regarding his sexual activity with the victim, his treatment for mental illness, incidents of inappropriate sexual behavior, and solicitation of another to engage in kidnapping and rape. The defendant contends that the victim's brother told a counselor or therapist that his biological father had taught him how to have sex with the victim, that he had had sex with the victim, and that his biological father had watched the sexual acts as they were committed. The state asserted at trial that the evidence only showed that Jeremy Beard's mother reported to a mental health professional that her son had made such comments to her. In a jury-out hearing, Jeremy Beard repeatedly stated that he could not remember if he had ever made such comments. The defendant asserted that Jeremy Beard had made the comments to a counselor or therapist in February 1997, while receiving treatment following the victim's murder. Jeremy Beard admitted that at the time of trial, he was living in a residential treatment facility and that he had lived in several mental hospitals, detention centers, and group homes. He testified that his mother had accused him of attempting inappropriate conduct toward his stepfather, but he could not recall the specific allegations by his mother. He denied that he was prohibited from being placed in a foster home where small children were present, but he admitted that he thought about sex all the time. The defense attempted to introduce a letter Jeremy Beard had written to Quinton Donaldson, who was once a suspect in the case, asking Donaldson to kidnap and rape him. The defendant asserts that he sought to introduce the foregoing evidence to show that someone other than himself was responsible for or had the motive to commit the crimes committed against the victim.

The trial court precluded the defendant from questioning Jeremy Beard on the issue of his prior sexual activity with the victim. The court ruled that if it happened, it was "remote in time and irrelevant and possibly confusing to the jury and inadmissible." In its order denying the defendant's motion for new trial, the court expanded its ruling. It stated that the questioning was inadmissible under the third party defense theory, it lacked relevance, and any minimal relevance was substantially outweighed by the danger of creating unfair prejudice and misleading the jury. The trial court essentially concluded that the evidence was inadmissible under Rules 401, 403 and 404(b), Tenn. R. Evid.

Regarding the third party defense theory, the trial court noted that the defendant could prove by competent evidence that another person committed or was inclined to commit the offense in question. See State v. Spurlock, 874 S.W.2d 602, 612 (Tenn. Crim. App. 1993). However, it quoted State v. Carruthers, 35 S.W.3d 516, 575 (Tenn. 2000) (appendix) for the proposition that "[t]he evidence must be the type that would be admissible against the third party if he or she were on trial, and the proof must be limited to facts inconsistent with the [defendant's] guilt." The trial court believed that any argument that Jeremy Beard was involved in the victim's disappearance was unpersuasive under the evidence, and the court was not convinced that any assumed sexual interest he had in the victim was inconsistent with the defendant's guilt. Also, the trial court concluded that the evidence was not admissible because it would not be admissible in a trial of Jeremy Beard under Rule 404(b), Tenn. R. Evid., because it was propensity evidence. We conclude that the evidence was not barred under Rule 404(b).

The Tennessee Supreme Court has held that Rule 404(b) does not bar evidence of crimes, wrongs, or acts by a person other than the defendant. State v. Stevens, 78 S.W.3d 817, 837 (Tenn. 2002) (stating that 404(b) does not apply when a third party defense is at issue); State v. DuBose, 953 S.W.2d 649, 653 (Tenn. 1997). Moreover, the court has concluded that the admissibility of evidence that implicates a person other than the defendant for the crime is governed solely by the Rules of Evidence, not by a stricter standard. State v. Powers, 101 S.W.3d 383, 394-95 (Tenn. 2003). We view this to mean that, as far as relevance is concerned, evidence that has a tendency to make the fact of another perpetrator more probable than not would be admissible. See Tenn. R. Evid. 401. Obviously, the extent of its inconsistency with the defendant's guilt would bear on the probative value of such evidence, which would be important when a trial court weighs the probative value against the danger of prejudice or confusion in order to determine admissibility under Rule 403, Tenn. R. Evid.

Therefore, the remaining issues regarding evidence of Jeremy Beard's alleged sexual behavior with the victim relate to its relevance and whether its probative value was substantially outweighed by the danger of prejudice or confusion. See Tenn. R. Evid. 401 and 403. In the present case, the defendant wanted to question Jeremy Beard about, and otherwise to prove, his having sex with the victim in the past. From this, the defendant wanted the jury to infer that Jeremy Beard had sex with the victim so as to be the source of the semen found in the victim's shorts or, at least, to doubt whether the defendant raped the victim.

At this point, we must note that the factual premise to the defendant's argument is largely unsubstantiated by the record. Defense counsel told the court that records existed showing that Jeremy Beard told others that his father taught him to have sex with the victim. Reference was particularly made to one record apparently indicating that he had told his mother, who, in turn, had told his counselor. However, the records are not in the record on appeal. Also, as noted, Jeremy Beard was questioned about his telling others about such offense, but he said he did not remember doing so. However, he was not asked if he, in fact, ever had sex with the victim and, if so, when. Moreover, his mother was never asked if her son had told her that he had had sex with the victim.

Thus, the defendant's proffer of evidence and the record before us show almost no support for the defendant's claims about Jeremy Beard's past conduct.

The trial court noted that, even if true, any conduct about which Jeremy talked to others occurred no later than 1994, some two years before the victim's abduction and death. The trial court considered the events too remote in time to make it "more probable that Beard kidnapped, raped, and murdered, [the victim] two or more years later. Assuming the defendant could meet [the relevance] standard, the minimal relevance of this remote conversation is substantially outweighed by the danger of creating unfair prejudice and misleading the jury. See Tenn. R. Evid. 403." However, the trial court also noted that the defendant "failed to establish that the evidence was relevant for any purpose other than showing action in conformity with a character trait." Although this comment related to the trial court's analysis of the evidence under Rule 404(b), it indicates that the evidence had probative value by showing propensity. As previously noted, although such evidence is inadmissible relative to the defendant under Rule 404(b), it would not apply to evidence against Jeremy Beard. Under these circumstances, we are not confident that the trial court correctly analyzed the nature of the evidence and its admissibility if the underlying allegations were true. We believe, though, the record is inadequate for us to conclude that the defendant suffered prejudice.

As previously indicated, the evidence submitted by the defendant was minimal and its relevance quite tenuous. The events attributed to Jeremy Beard at his father's direction occurred approximately two years before the victim's death. Without more recent evidence, such circumstances lead mainly to speculation, not inference, that the purported conduct continued in the absence of their father until the time of the victim's death. Unquestionably, the proof shows that Jeremy Beard was not involved in his sister's abduction. Also, the evidence reflects that she changed her clothes just before she was kidnapped. In this regard, although the evidence would not exclude a possibility that Jeremy Beard was the donor of the semen in the victim's shorts, the record does not support a rational basis for such a possibility. The defendant has failed to show that he was prejudiced by the exclusion of evidence regarding Jeremy Beard.

The defendant also contends that the trial court erred in excluding testimony and evidence of a letter written by Jeremy Beard asking Quinton Donaldson to kidnap and rape him. The defendant argues that "[t]he fact that Beard wrote such a letter . . . is somewhat probative of whether Donaldson may have been implicated in the victim's disappearance." Tennessee Rules of Evidence 401 provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The fact that Jeremy Beard wrote a letter to Quinton Donaldson asking Donaldson to kidnap and rape him does not have the tendency to make the assertion that Donaldson was involved in the victim's kidnapping, rape and murder more probable. The trial court ruled that the letter from Beard to Donaldson was not inconsistent with the defendant's guilt, that the letter was irrelevant under Rule 401, and that the letter was inadmissible under a third party defense theory. We conclude that the trial court did not err in excluding the letter.

The defendant makes two final arguments with respect to evidence regarding Jeremy Beard. First, he asserts that the jury was deprived of evaluating the victim impact evidence presented by Jeannie Meyer that Jeremy Beard had to receive treatment related to his sister's death and the family had spent thousands of dollars for medical bills as a result. The defendant argues that the jury should have been provided with the evidence that Jeremy Beard had psychological problems before his sister's death. We note, though, that the defendant did not present this argument during the sentencing phase and that the record does not contain evidence of Jeremy Beard's psychological history and treatment. Second, the defendant argues that the absence of evidence of Jeremy Beard's sexual history with the victim affected the jury's sentencing determination adversely to him. He points to the fact that two of the aggravating circumstances depended upon a finding that the defendant had committed or attempted to commit rape. He argues that the excluded evidence would have cast doubt on his guilt for the crime of rape, which also affected the jury's capital sentencing decision. Again, we note that the defendant did not present this argument during the sentencing phase. In any event, we do not believe the record shows that the defendant was prejudiced by the exclusion.

VII. PHOTOGRAPHS OF VICTIM

A. Photographs of victim's skull

The defendant contends that the trial court erroneously admitted eight photographs of the victim's skull in the wooded area where it was found. The state argues that it introduced the photographs of the skull, which was intact and not fractured, to rebut the defendant's claim that he had accidentally run over the victim and thrown her body in the river, to support the testimony of Dr. Marks and his identification of the victim, and to depict the location of the area where the skull was found. The trial court ruled that the photographs were not particularly gruesome and that any prejudicial effect was minimal. The trial court stated on the record: "We do have a dead child and a decomposed body and a skeleton and so all things considered, I am going to let [the photographs] in."

The admissibility of relevant photographs of victims and the crime scene is within the sound discretion of the trial judge, and his or her ruling on admissibility will not be disturbed on appeal absent a showing of an abuse of that discretion. State v. Carruthers, 35 S.W.3d 516, 576-57 (Tenn. 2000), cert. denied, 533 U.S. 953 (2001); State v. Van Tran, 864 S.W.2d 465, 477 (Tenn. 1993), cert. denied, 511 U.S. 1046 (1994); State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978). As the Supreme Court stated in Carruthers, the modern trend is to vest more discretion in the trial judge's rulings on admissibility. Carruthers, 35 S.W.3d at 577 (citing Banks, 564 S.W.2d at 949); State v. Michael Carlton Bailey, No. 01C01-9403-CC-00105, Dickson County (Tenn. Crim. App. July 20, 1995), app. denied (Tenn. Jan. 8, 1996).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. However, relevant evidence "may be excluded if its

probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Tenn. R. Evid. 403. Prejudicial evidence is not excluded as a matter of law. Carruthers, 35 S.W.3d at 577 (citing State v. Gentry, 881 S.W.2d 1, 6 (Tenn. Crim. App. 1993)). The court must still determine the relevance of the visual evidence and weigh its probative value against any undue prejudice. Id. The term "undue prejudice" has been defined as "[a]n undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Banks, 564 S.W.2d at 950-51.

In Banks, the Supreme Court gave the trial courts guidance for determining the admissibility of relevant photographic evidence. A trial court should consider: the accuracy and clarity of the picture and its value as evidence; whether the picture depicts the body as it was found; the adequacy of testimonial evidence in relating the facts to the jury; and the need for the evidence to establish a prima facie case of guilt or to rebut the defendant's contentions. Banks, 564 S.W.2d at 951. In this case, all of the photographs at issue are accurate and clear, and they have substantial evidentiary value. The photographs depict the area in which the skull was found. They support the testimony of Dr. Marks' testimony as to the identity of the victim as well as that of Jerry Lee Brown who found the remains. We believe that the photographs are not particularly gruesome and that the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice, misleading of the jury, or confusion of the issues. The trial court did not abuse its discretion in admitting the photographs.

B. Life photograph

The defendant also challenges the introduction of a photograph of the victim taken during her lifetime. The defendant claims that the photograph served only to inflame the jurors and appeal to their emotions. The state responds that the photograph was probative of the impact the victim's death had on family members and to show those unique characteristics which provide a brief glimpse into the life of the victim. The Tennessee Supreme Court has held:

> [g]enerally, victim impact evidence should be limited to information to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's immediate family.

Nesbit, 978 S.W.2d at 887. In this case, the photograph was introduced to provide a brief glimpse into the life of the victim, as allowed by Nesbit. Moreover, the photograph admitted in this case was the same photograph the defendant signed to acknowledge that the picture depicted the girl he had claimed he ran over and threw into the river. The court did not err in allowing the introduction of this photograph.

VIII. "INTENTIONAL" ELEMENT OF FIRST DEGREE PREMEDITATED MURDER

The defendant contends that the trial court erroneously instructed the jury on the definition of the "intentional" element of first degree premeditated murder, which resulted in a violation of his constitutional rights to trial by jury, due process, and freedom from cruel and unusual punishment. The defendant has the constitutional right to a trial by jury under both the United States and Tennessee Constitutions. See State v. Garrison, 40 S.W.3d 426, 432 (Tenn. 2000) (citing U.S. Const. amend. VI; Tenn. Const. art. I, sec. 6). Tennessee law requires that all issues of fact be tried and determined by twelve jurors. Id. Accordingly, a defendant has a right to a correct and complete charge of the law, in order that each issue of fact raised by the evidence will be submitted to the jury on proper instructions. Id. (citing State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990)). As this court recently stated, however, the jury instructions given at trial should not be measured against a standard of perfection. State v. Robert Faulkner, No. W2001-02614-CCA-R3-DD, Shelby County (Tenn. Crim. App. Sept. 26, 2003). Instead, we must determine if the challenged jury charge fairly defined the legal issues involved and did not mislead the jury. Id. (citing State v. Hall, 958 S.W.2d 679, 696 (Tenn. 1997); Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 446 (Tenn. 1992)).

The trial court instructed the jury pursuant to Tennessee Pattern Jury Instructions as follows:

> For you to find the defendant guilty of [first degree premeditated murder], the state must have proven beyond a reasonable doubt the existence of the following essential elements:
>
> (1) that the defendant unlawfully killed Jacqueline Annette Beard;
>
> and
>
> (2) that the defendant acted intentionally. A person acts "intentionally" when that person acts with a conscious objective or desire either to cause a particular result or to engage in particular conduct
>
> and
>
> (3) that the killing was premeditated.

See T.P.I.–Crim. 7.01(b) (4th ed. 1995) (emphasis added).

Specifically, the defendant contends that the instruction on the definition of "intentionally" erroneously informed the jury that they can convict the defendant of first degree premeditated murder based on a finding that he "acted with a conscious objective to engage in a particular conduct," which lessened the state's burden of proof. The defendant cites State v. Page, 81 S.W.3d 781, 786 (Tenn. Crim. App. 2002), in which this court held that the trial court's instruction on the element of

"knowing" for second degree murder was reversible error when the court defined "knowingly" as including a defendant's awareness (1) that his conduct is of a particular nature, (2) that a particular circumstance exists, or (3) that his conduct was reasonably certain to cause the result. Id. at 786. This court noted that second degree murder is a result-of-conduct offense, as opposed to a nature-of-conduct offense, i.e., the defendant must be aware that his or her conduct is reasonably certain to cause death in order to be found guilty. Id. at 788. Because the instruction in Page allowed the jury to convict on second degree murder based only upon awareness of the nature of the conduct or circumstances surrounding the conduct, the state argued the nature of the conduct, and the evidence was contested as to the defendant's mental state, this court remanded the case for a new trial.

This court has previously considered the holding of Page in the context of a conviction for first degree murder. See State v. Hill, 118 S.W.3d 380 (Tenn. Crim. App. 2002); State v. Robert Faulkner, No. W2001-02614-CCA-R3-DD, Shelby County (Tenn. Crim. App. Sept. 26, 2003); State v. Paul Graham Manning, No. M2002-00547-CCA-R3-CD, DeKalb County (Tenn. Crim. App. Feb. 14, 2003), app. denied (Tenn. Dec. 15, 2003). In each case, the court has concluded that an instruction as to the "nature of the conduct" relative to first degree murder is irrelevant and constitutes error because it improperly lessens the state's burden of proof. Hill, 118 S.W.3d at 385; Robert Faulkner, slip op. at 33; Paul Graham Manning, slip op. at 9. However, the court has distinguished the facts of each case from the facts of Page and concluded that the error was harmless.

Significantly, the present case is distinguishable from Page because the jury convicted the defendant of first degree premeditated murder, not second degree murder. Relative to premeditation, the trial court instructed the jury as follows:

> A premeditated act is one done after the exercise of reflection and judgment. Premeditation means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill preexist in the mind of the accused for any definite period of time. The mental state of the accused at the time he allegedly decided to kill must be carefully considered in order to determine whether the accused the was sufficiently free from excitement and passion as to be capable of premeditation. If the design to kill was formed with premeditation, it is immaterial that the accused may have been in a state of passion or excitement when the design was carried into effect. Furthermore, premeditation can be found if the decision to kill is first formed during the heat of passion, but the accused commits the act after the passion has subsided.

Thus, a finding of premeditation requires the jury to have concluded that the defendant "displayed a previously formed design or intent to kill." Hill, 118 S.W.3d at 385-86. As determined earlier, sufficient evidence exists in the record for the jury to have concluded that the defendant, who had introduced himself to the victim as a police officer, kidnapped the victim, drove her almost fifty miles away, raped her, and then intentionally and with premeditation caused the death of the victim.

The evidence in this case sufficiently supports the jury charge as to a finding of result-oriented conduct. In this case, as opposed to Page, the jury determined that the defendant had a preconceived design to commit the murder of the victim, resolving the issue of intent to cause death favorably to the state. Accordingly, this issue does not require reversal.

IX. FAILURE TO INSTRUCT VEHICULAR HOMICIDE AS A LESSER INCLUDED OFFENSE OF FIRST DEGREE MURDER

The right to jury instructions on lesser included offenses is based, in large measure, upon the constitutional right to trial by jury. See Tenn. Const. art. I, § 6; State v. Bowles, 52 S.W.3d 69, 77 (Tenn. 2001). The question of whether a given offense should be submitted to the jury as a lesser included offense is a mixed question of law and fact. State v. Rush, 50 S.W.3d 424, 427 (Tenn. 2001) (citing State v. Smiley, 38 S.W.3d 521 (Tenn. 2001)). The standard of review for mixed questions of law and fact is de novo with no presumption of correctness. Id.; see also State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). The trial court has a duty "to give a complete charge of the law applicable to the facts of a case." State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986); see also Tenn. R. Crim. P. 30. In addition, the trial court has a statutory duty to instruct the jury on all applicable lesser included offenses. See T.C.A. § 40-18-110.

At the close of proof, the defendant asked that the court charge the jury on the elements of vehicular homicide. The defendant asserted that vehicular homicide was a lesser included offense of first degree murder. The trial court denied the defendant's request for instruction of vehicular homicide as a lesser included offense of first degree murder. In denying the request, the trial court found that vehicular homicide was not a lesser included offense of first degree premeditated murder under the test set forth by the Supreme Court in Burns, 6 S.W.3d at 466-67. The trial court specifically determined that vehicular homicide contained the statutory element of operation of an automobile, which was in addition to the statutory elements of first degree murder.

In Burns, our supreme court adopted a modified version of the Model Penal Code in order to determine what constitutes a lesser included offense:

> An offense is a lesser-included offense if:
>
> (a) all of its statutory elements are included within the statutory elements of the offense charged; or
> (b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing
> (1) a different mental state indicating a lesser kind of culpability; and/or
> (2) a less serious harm or risk of harm to the same person, property or public interest, or
> (c) it consists of
> (1) facilitation of the offense charged or of an offense that otherwise

> meets the definition of lesser-included offense in part (a) or (b); or
> (2) an attempt to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
> (3) solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b).

Burns, 6 S.W.3d at 466-67.

After the trial in this case, this court held that vehicular homicide is not a lesser included offense of first degree murder. State v. Harvey Phillip Hester, No. 03C01-9704-CR-00144, Hamilton County (Tenn. Crim. App. Mar. 22, 2000). The court analyzed the statutory elements of vehicular homicide and first degree murder, as required by Burns and explained as follows:

> Under our statutory scheme, the term "criminal homicide" means "the unlawful killing of another person which may be first degree murder, second degree murder, voluntary manslaughter, criminally negligent homicide, or vehicular homicide." Tenn.Code Ann. § 39-13-201. First degree murder is defined as follows:
>
> > (a) (1) a premeditated and intentional killing of another;
> >
> > (2) a killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse or aircraft piracy; or
> >
> > (3) a killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb.
> >
> > (b) No culpable mental state is required for a conviction under subdivision (a)(2) or (a)(3) except the intent to commit the enumerated offenses or acts in such subdivisions.
>
> By comparison, the statute prohibiting vehicular homicide provides, in pertinent part, as follows:

> (a) Vehicular homicide is the reckless killing of another by the operation of an automobile, airplane, motorboat or other motor vehicle:
>
> (1) As the proximate result of conduct creating a substantial risk of death or serious bodily injury to a person; or
>
> (2) As the proximate result of the driver's intoxication as set forth in § 55-10-401. For the purposes of this section, "intoxication" includes alcohol intoxication as defined by § 55-10-408, drug intoxication, or both.

Tenn. Code Ann. § 39-13-213. Vehicular homicide, of course, requires the "operation of an automobile, airplane, motorboat, or other motor vehicle...." That element is not necessary for the conviction of either first degree murder or second degree murder. In Dominy, our supreme court placed emphasis upon the defendant's constitutional right to be given notice of the offense or offenses charged. 6 S.W.3d at 476; see also State v. Hill, 954 S.W.2d 725, 727 (Tenn. 1997). It observed that Tenn. Code Ann. § 40-30-202 required indictments to "state the facts constituting the offense in ordinary and concise language ... in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment...." Dominy, 6 S.W.3d at 476, n.6; see also Tenn. R. Crim. P. 31(c) ("The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."). Our supreme court cited with approval Howard v. State, 578 S.W.2d 83, 85 (Tenn. 1979),and its holding that "an offense is necessarily included in another if the elements of the greater offense, as those elements are set forth in the indictment, include, but not are not congruent with, all the elements of the lesser." Dominy, 6 S.W.3d at 476. In other words, the offense is lesser included if "all its elements are contained within the elements of the offense charged in the indictment." Id.

Because vehicular homicide contains a statutory element not contained in first degree murder, that is, "the operation of an automobile, airplane, motorboat or other motor vehicle," vehicular homicide is not a lesser included offense. That additional element has

> nothing to do, of course, with the mental state of the defendant or the harm or risks to the victim. An indictment charging first degree murder would not be sufficient to support a conviction of vehicular homicide. Thus, the trial court here was not in error by refusing to charge to the jury the offense of vehicular homicide.

Harvey Phillip Hester, slip op. at 13-15. The defendant acknowledges this court's holding in Hester, but asks this court to reverse that decision. The defendant also seeks an exception to Burns, maintaining that the application of Burns to his case deprived him of the right to present a defense. We conclude, however, that Harvey Phillip Hester reflects the correct law and that no basis exists to provide an exception to Burns for vehicular homicide.

X. CONSTITUTIONALITY OF T.C.A. § 39-13-204

The defendant contends that T.C.A. § 39-13-204(f), providing that the jury must unanimously agree that the aggravating circumstances do not outweigh the mitigating circumstances in order to impose a life sentence, and T.C.A. § 39-13-204(h), prohibiting the trial court from informing the jury as to the effect of a nonunanimous verdict in the sentencing phase, violate his state and federal constitutional rights to a fair trial. Further, the defendant argues that Tennessee's death penalty statutes violate the holdings of McKoy v. North Carolina, 494 U.S. 433, 100 S. Ct. 1227, 1233 (1990), and Maryland v. Mills, 486 U.S. 367, 108 S. Ct. 1860 (1988), in that they require the jury to agree unanimously that the aggravating circumstances do not outweigh the mitigating circumstances before providing for a sentence less than death. See T.C.A. § 39-13-204(f)(1)-(2). These arguments have been rejected by the Tennessee Supreme Court. State v. Keen, 31 S.W.3d 196, 233 (Tenn. 2000); State v. Brimmer, 876 S.W.2d 75, 87 (Tenn. 1994); State v. Hall, 958 S.W.2d 679, 718 (Tenn. 1997); State v. Cazes, 875 S.W.2d 253, 269 (Tenn. 1994); State v. Smith, 857 S.W.2d 1, 22-23 (Tenn. 1993); State v. Harris, 839 S.W.2d 54, 76-77 (Tenn. 1992); State v. Thompson, 768 S.W.2d 239, 250 (Tenn. 1989).

XI. IMPOSITION OF DEATH PENALTY

Finally, the defendant contends that the death penalty is unconstitutional because it is imposed in a discriminatory manner. The Supreme Court has rejected this argument and held that the death penalty is not imposed in a discriminatory manner as to economics, race, geography or gender. State v. Hines, 919 S.W.2d 573 (Tenn. 1995); Cazes, 875 S.W.2d at 269; Smith, 857 S.W.2d at 22-23.

XII. CONSTITUTIONALITY OF PROPORTIONALITY REVIEW

The defendant contends that the proportionality review mandated by T.C.A. § 39-13-206 is inadequate because it fails to apply meaningful standards for assessing whether a death sentence is disproportional. The supreme court set forth the criteria for determining whether a sentence is proportional in State v. Bland, 958 S.W.2d 651, 667-68 (Tenn. 1997). The defendant challenges the

adequacy of Tennessee's proportionality review and the criteria set forth in Bland, but the supreme court has rejected this challenge on numerous occasions. See Brimmer, 876 S.W.2d at 87; Cazes, 875 S.W.2d at 270-71; Harris, 839 S.W.2d at 77.

XIII. REVIEW PURSUANT TO T.C.A. § 39-13-206(c)

For a reviewing court to affirm the imposition of a death sentence, T.C.A. § 39-13-206(c)(1) requires a determination that:

> (1) the sentence was not imposed in an arbitrary fashion;
>
> (2) the evidence supports the jury's finding of statutory aggravating circumstance(s);
>
> (3) the evidence supports the jury's finding that the aggravating circumstances outweigh any mitigating circumstances; and
>
> (4) the sentence is not excessive or disproportionate to the penalty imposed in similar cases.

The sentencing phase in the present case was conducted pursuant to the procedure established in the applicable statutory provisions and rules of criminal procedure. We conclude that the sentence of death, therefore, was not imposed in an arbitrary fashion. Moreover, the evidence indisputably supports the aggravating circumstances.

Additionally, we are required by T.C.A. § 39-13-206(c)(1)(D), and under the mandates of Bland, 958 S.W.2d at 661-674, to consider whether the defendant's sentence of death is disproportionate to the penalty imposed in similar cases. See State v. Godsey, 60 S.W.3d 759, 781-82 (Tenn. 2001). The comparative proportionality review is designed to identify aberrant, arbitrary, or capricious sentencing by determining whether the death penalty in a given case is "disproportionate to the punishment imposed on others convicted of the same crime." State v. Stout, 46 S.W.3d 689, 706 (Tenn. 2001) (citing Bland, 958 S.W.2d at 662 (quoting Pulley v. Harris, 465 U.S. 37, 42-43, 104 S. Ct. 871, 875 (1984))). If a case is "plainly lacking in circumstances consistent with those in cases where the death penalty has been imposed," then the sentence is disproportionate." Stout, 46 S.W.3d at 706 (citations omitted).

The Tennessee Supreme Court has explained comparative proportionality review as follows:

> In conducting a comparative proportionality review, we begin with the presumption that the sentence of death is proportional with the crime of first degree murder. State v. Hall, 958 S.W.2d 679 (Tenn. 1997). A sentence of death may be found disproportionate if the case being reviewed is "plainly lacking in circumstances consistent with

> those in similar cases in which the death penalty has previously been imposed." Id. citing State v. Ramsey, 864 S.W.2d 320, 328 (Mo. 1993). A sentence of death is not disproportionate merely because the circumstances of the offense are similar to those of another offense for which a defendant has received a life sentence. State v. Bland, 958 S.W.2d 651 (Tenn. 1997) (citing State v. Carter, 714 S.W.2d 241, 251 (Tenn. 1986)). Our inquiry, therefore, does not require a finding that a sentence "less than death was never imposed in a case with similar characteristics." Bland, 958 S.W.2d at 665. Our duty "is to assure that no aberrant death sentence is affirmed." Id. (citing State v. Webb, 238 Conn. 389, 680 A.2d 147, 203 (Conn. 1996)).
>
> Our proportionality review is neither a rigid nor an objective test. Hall, 958 S.W.2d at 699. There is no "mathematical formula or scientific grid," and we are not bound to consider only cases in which the same aggravating circumstances were found applicable by a jury. Id.; State v. Brimmer, 876 S.W.2d 75, 84 (Tenn. 1994). This Court considers many variables when choosing and comparing cases. Bland, 958 S.W.2d at 667. Among these variables are: (1) the means of death; (2) the manner of death (e.g., violent, torturous, etc.); (3) the motivation for the killing; (4) the place of death; (5) the similarity of the victims' circumstances including age, physical and mental conditions, and the victims' treatment during the killing; (6) the absence or presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effects on non-decedent victims. Id.; Hall, 958 S.W.2d at 699. Factors considered when comparing characteristics of defendants include: (1) the defendants' prior criminal record or prior criminal activity; (2) the defendants' age, race, and gender; (3) the defendants' mental, emotional or physical condition; (4) the defendants' involvement or role in the murder; (5) the defendants' cooperation with authorities; (6) the defendants' remorse; (7) the defendants' knowledge of helplessness of victim(s); and (8) the defendants' capacity for rehabilitation. Id.

State v. Hall, 976 S.W.2d 121, 135 (Tenn. 1998).

We have compared the circumstances of the present case with the circumstances of similar cases and conclude that the sentence of death in this case is proportionate to the sentences imposed in similar cases. See e.g., State v. Keen, 32 S.W.3d 196 (Tenn. 2000) (where the defendant pleaded guilty to murder in the perpetration of rape of an eight-year-old child and the jury found aggravating circumstances (i)(1) and (i)(5) and sentenced defendant to death); State v. Irick, 762 S.W.2d 121

(Tenn. 1988) (jury convicted defendant of aggravated rape and murder of seven-year-old child and jury found aggravating circumstances (i)(1), (i)(5), (i)(6) and (i)(7) and sentenced defendant to death); State v. Coe, 655 S.W.2d 903 (Tenn. 1983) (jury convicted defendant of aggravated rape, aggravated kidnapping and murder in the first degree of an eight-year-old child and found aggravating circumstances (i)(1), (i)(5), (i)(6), and (i)(7) and sentenced defendant to death). But see State v. Paul William Ware, No. 03C01-9705-CR-00164, Hamilton County (Tenn. Crim. App. Apr. 20, 1999) (jury convicted defendant of rape and murder of four-year-old victim and sentenced him to life without parole, but the defendant was under the influence of intoxicants at time of murder), app. denied (Tenn. Nov. 22, 1999); State v. James Lloyd Julian, II, No. 03C01-9511-CV-00371, Loudon County (Tenn. Crim. App. July 24, 1997) (defendant was sentenced to life without parole where defendant raped and murdered three-year-old victim, but defendant was under influence of marijuana and alcohol at the time of crimes), app. denied (Tenn. Apr. 20, 1998). After reviewing these and other cases, we are of the opinion that the penalty imposed by the jury in this case is not disproportionate to the penalty imposed for similar crimes.

CONCLUSION

We have considered the entire record and conclude that the sentence of death has not been imposed arbitrarily, that the evidence supports the jury's finding of the statutory circumstances, that the evidence supports the jury's finding that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt, and that the sentence is proportionate. We have also reviewed all issues raised by the appellant and conclude that no reversible error exists. In consideration of the foregoing and the record as a whole, we affirm the judgments of the trial court and the sentence of death imposed by the jury.

_____

JOSEPH M. TIPTON, JUDGE